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IN THE

Supreme Court of the United States

October Term, 1944

No. 403

WILLIAM MAHER,

Petitioner,

vs.

THE STATE OF NEBRASKA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEBRASKA AND BRIEF IN SUPPORT THEREOF

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Law Briefs—OMAHA LINO-SLUG CO.—418 So. 15th St.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEBRASKA AND BRIEF IN SUPPORT THEREOF

———o—o———

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

OPINION SOUGHT TO BE REVIEWED

Your petitioner, William Maher, respectfully prays that a Writ of Certiorari issue to review a final decision of the Supreme Court of Nebraska, the highest Court of said State, rendered on March 17th, 1944, at Lincoln,

Nebraska (R. pp. 97 to 116, incl.), and which is reported in —— Neb. ——, 13 N. W. (2d) 641, which decision, by an unanimous Court, sustained the conviction of your petitioner in the District Court of Douglas County, Nebraska, at which trial at Omaha, Nebraska, the Honorable Harry D. Landis, Nebraska District Judge, pursuant to Nebraska law, was called from a Judicial District of Nebraska, other than the one he was elected from, to preside at said jury trial.

SUMMARY AND SHORT STATEMENT OF THE MATTERS INVOLVED

Petitioner was arrested by police officers, without a warrant, in Omaha, Nebraska, on February 25th, 1942 (R. pp. 43-44 and p. 53), and was held on an alleged "open charge of Investigation" (R. 51), until a preliminary complaint was filed against him in the Municipal Court of Omaha, Nebraska, on February 27th, 1942 (R. pp. 3-4 and p. 47). The pertinent portion of the charging part of Count 1 of this Complaint (R. p. 3), which is the only material Count in this inquiry, was as follows:

> "that William Maher and Tony Scavio, on or about the 25th day of February, 1942, in the County aforesaid and within the corporate limits of the City of Omaha aforesaid, then and there being, the said William Maher and Tony Scavio did then and there wilfully and maliciously attempt to set fire to and burn, committing acts preliminary thereto and in furtherance thereof a certain building situated at 3011 St. Mary's Avenue in the City of Omaha, County of Douglas, State of Nebraska, owned by Lucille F. Lanphier, and personal property consisting of fixtures of the value of $500.00 belonging to Raymond C. Agosta and situated at and in the premises located at 3011 St. Mary's Avenue in the City of Omaha, County of Douglas, State of Nebraska."

This prosecution and the foregoing complaint were grounded upon Section 28-5,101 of the Compiled Statutes of Nebraska, which is a portion of the "so-called" "Uniform Arson Law."

> "Arson, Fourth Degree, Penalty. Any person who wilfully and maliciously attempts to set fire to or attempts to burn or to aid, counsel or procure the burning of any of the buildings or property mentioned in the foregoing sections, or who commits any act preliminary thereto, or in furtherance thereof, shall be guilty of arson in the fourth degree and upon conviction thereof be sentenced to the Penitentiary for not less than one nor more than two years or fined not to exceed One Thousand oDllars. The placing or distributing of any inflammable, explosive or combustible material or substance, or any device in any building or property mentioned in the foregoing sections in an arrangement or preparation with intent to eventually wilfully and maliciously set fire to or burn same, or to procure the setting fire to or burning of same shall, for the purpose of this act, constitute an attempt to burn such building or property." (1935 Supplement to Statutes, p. 217.)

A warrant was issued in pursuance of said complaint on February 27th, 1942, and same was served on the petitioner that day (R. 2). On February 27th, 1942, the prosecutor requested the Court to set the preliminary hearing for a future date. This was objected to by Mr. North, attorney for the petitioner, who demanded an immediate hearing and after an all morning discussion the hearing was continued to March 5th, 1942 (R. p. 51 and p. 4). The petitioner demanded a hearing in the Police Court the morning of his arrest, but the hearing was ultimately put off for two weeks (R. p. 65). The petitioner entered a plea of not guilty on March 5th, 1942 (R. pp. 4 and 47), and was granted a separate trial, which was to be had on March 8th, 1943.

On March 5th, 1942, petitioner's attorney, Mr. North, moved to dismiss the complaint because of the denial to petitioner of a speedy and impartial hearing and contended that the failure of the State to accord the petitioner a speedy trial was violative of the due process clause of the 14th Amendment to the United States Constitution (R. p. 52).

Further continuances were had to March 6th, March 9th, March 10th, March 11th and March 13th, 1942 (R. p. 48).

On March 13th, 1942, after a preliminary hearing was had the petitioner was bound over to the District Court to stand trial, one of the charges being that Contained in Count 1 of the complaint, which charged "Arson in the Fourth Degree," and he was released on bail (R. p. 2).

On March 17th, 1942, an Information was filed in the District Court of Douglas County, Nebraska, the pertinent portion of the charging part of Count 1 thereof, which is the only material Count in this inquiry, was as follows:

> "That on or about the 25th day of February, 1942, William Maher and Tony Scavio, late of the County of Douglas aforesaid, in the County of Douglas and State of Nebraska aforesaid, then and there being, did then and there wilfully and maliciously attempt to set fire to and burn, committing acts preliminary thereto and in furtherance thereof a certain building situated at 3011 St. Mary's Avenue in the City of Omaha, County of Douglas, State of Nebraska, owned by Lucille F. Lanphier, and personal property consisting of fixtures of the value of $500.00, belonging to Raymond C. Agosta, and situated at and in the

premises located at 3011 St. Mary's Avenue in the City of Omaha, County of Douglas, State of Nebraska."

After the filing of the Information the petitioner demanded of members of the County Attorney's office, on three or four occasions, that they give him a trial in said case (R. pp. 65 and 66), but no speedy trial was had. He further testified that from the time of the preliminary hearing up to the trial date in the District Court, that "there were lots of different juries and Courts in session," and that he was demanding trial of his case and wanted to get it over with as it was keeping him in town; that he was going to try to go back to the navy (R. p. 58), where he served during the last war (R. p. 56), but he had to wait for his trial in this case (R. p. 59).

The petitioner's attorney, Mr. North, from the inception of the case in Police Court, demanded a trial of the case (R. pp. 51 and 92), and a month previous to his actual trial in the District Court, resisted the State's Application for a Continuance, because one of their material witnesses, a Mr. Campen, was away (R. pp. 66, 67, 68 and pp. 81-82), but no trial was accorded the petitioner until March 9th, 1943 (R. p. 11), which lacked sixteen days from being one year after the Information was on file in the District Court, said filing date being March 17th, 1942.

That when the State of Nebraska determined to try the petitioner, the testimony of the following witnesses for the defense were not available (R. pp. 73 to 82, incl., and pp. 55 to 65, incl.).

Raymond C. Agosta, one of the parties named in the complaint and who owned the personal property men-

tioned therein, had died of appendicitis 20 minutes before the trial was called (R. p. 73 and R. p. 75, also see R. pp. 66-67).

Mike Scavio was drawn under the Selective Service and was in the United States Army (R. p. 69 and R. p. 76).

William Joseph was drawn under the Selective Service and was in the United States Army (R. pp. 76-77).

Harry Ostrum was in the United States Army at Camp Clebourne, Alabama (R. pp. 70-71, and R. pp. 77-78).

Emmett Gardner was drawn under the Selective Service and was in the United States Army at Lowry Field, Colorado (R. p. 78).

Joseph Sullivan had died suddenly (R. pp. 61-62).

Harry Kane was drawn in the Selective Service and was in the United States Army at a Radio Technical School at Kansas City, Kansas (R. pp. 69-70 and R. pp. 78-79).

Rudolph Braun was drawn in the Selective Service and was in the United States Army at Fort Riley, Kansas (R. pp. 71-72 and R. p. 79).

Lawrence Scavio was in the United States Army and was stationed at Fort Ord, California (R. pp. 68-69 and R. pp. 79-80).

Selective Service employees testified that Lawrence Scavio (R. pp. 68-69), Mike Scavio (R. p. 69), Harry

Kane (R. pp. 69-70), Harry Ostrum (R. pp. 70-71) and Rudolph Braun (R. pp. 71-72) were actually called in the Selective Service and were in the United States Army.

What these nine witnesses would testify to is shown in the testimony of the petitioner (R. pp. 55-65) and in the Motion for a Continuance (R. pp. 73 to 82), which facts, stated in the Motion, were sworn to under oath by Mr. North, said oath being administered by the Court (R. p. 81).

The case was called for trial when Mr. North, the petitioner's only attorney, was ill (R. p. 74 and R. p. 82) and when his Doctor certified to the Court that he would not be physically able to do this Court work for several weeks (R. pp. 85-86), when he could not secure the services of a lawyer or a law firm whom he had negotiated with and who were busy on other matters (R. p. 75).

All of the foregoing was made the basis of a Motion for a Continuance (R. pp. 78 and 82, incl., and R. pp. 85-86), which, as aforesaid, was under oath (R. p. 81), but the Motion for a Continuance was denied (R. pp. 82-83), with the admonition by the Trial Judge: "I am going to treat you right as to your health"—"I am going to watch your situation and see that you are looked after" (R. p. 83). The Court further said: "We are now about to impanel the jury in this case of State vs. Maher, and I am informing the defendant in the presence of his counsel and counsel for the State that he should see that he has co-counsel with Mr. North in case Mr. North should not feel strong enough to proceed, the case will proceed, and that he had better obtain counsel to assist Mr. North so that he can go ahead with the case to a final conclusion." And, mind you, all of this was said when the

trial was commencing and both counsel and the defendant were obliged to be present in Court and in attendance daily. The Court also asked Mr. North if he wanted to recess until one-thirty or two o'clock and Mr. North said "anytime." The Court asked Mr. North if he was feeling better and Mr. North said "Yes." (R. p. 132 and R. pp. 134-135), all of which indicated that the Court was fully cognizant of Mr. North's condition, and honestly believed he was ill as he claimed to be.

Prior to the commencement of the trial petitioner filed and presented to the Court a Motion to Quash (R. pp. 6 to 8, incl.), which was overruled (R. p. 9), and a Demurrer (R. p. 9), which was also overruled (R. p. 10). On March 8th petitioner was granted a separate trial (R. p. 10), was arraigned in chambers and stood mute (R. p. 10 and R. pp. 83 to 85, incl.), and a plea of "Not Guilty" was entered in his behalf (R. p. 85).

A jury was selected to try the case (R. pp. 11 and 12) and thereafter, at the close of the State's case in chief, the petitioner made a "Motion to Discharge the Jury, or For a Directed Verdict" (R. pp. 87 to 91, incl.), which was denied by the Court (R. p. 91), and a "Motion to Dismiss the Case" (R. pp. 91 to 93, incl.), which was also overruled (R. p. 91), and petitioner also made a Motion for a Directed Verdict at the close of all of the Evidence (R. pp. 92 to 96, incl.), which was denied by the Court (R. p. 96), all three of which Motions, and all of the aforementioned pleadings, amply preserved the points heretofore disclosed, and repeatedly called the attention of the trial Court to the legal questions involved in this case and herein advanced.

At this time we desire to set forth a resume of the evidence in the case which the State claims proves the

petitioner guilty of the alleged offense, but which we claim is insufficient in law. This resume is from the opinion of the Nebraska Supreme Court and is accurate and correct and is to be found in the Printed Record at pages 110 to 113, inclusive:

> "The defendant contends that the evidence is insufficient to establish the CORPUS DELICTI of the crime charged and that under the rule as to circumstantial evidence it is insufficient to sustain defendant's conviction.
>
> "Evidence offered by the State shows that Raymond C. Agosta owned the fixtures and operated a restaurant and beer business at 3011 St. Mary's Avenue, Omaha, Douglas County, Nebraska, known as the Red Rooster Cafe. His wife, Rosie, was a sister of Tony, Lawrence and Mike Scavio, who will be referred to herein. Agosta had been trying to sell his business but had been unsuccessful in doing so. He had removed or changed some of the equipment in the restaurant. On January 15th, 1942, he purchased fire insurance on the contents in the sum of $1,300. There was very little stock in the place on Februaary 24, 1942.
>
> "On the afternoon of February 24, 1942, the defendant, William Maher, rented a car from the Capitol Drive It Yourself Co., in Omaha, and went to the Continental Can Co., where he purchased two square five-gallon cans similar to the one found at the cafe. Later that evening, or rather in the early morning of February 25th, at about 2:30 A. M., Lickert and Elias, officers of the Omaha police force, stopped their cruiser car on St. Mary's Avenue, just east of the cafe, to assist a resident of the city, who was asleep in his car. At that time the cafe was closed. They awakened him and finding his condition such that he was not able to drive, took him to his home. It might be mentioned that a heavy snow had fallen and generally the sides of the street were blocked with snow

and only the lanes for traffic were open. The car in which the resident was asleep was in the traffic lane on St. Mary's Avenue, just east of the cafe.

"After taking this party home the officers, some time between 3:30 and 4:00 A. M., while driving down St. Mary's avenue, noticed that all of the lights in the cafe were out and the door was slightly open. They stopped their car and Officer Lickert immediately went to the front door, and Officer Elias flashed the spotlight on the cafe and started to go to the back door, but changed his mind and likewise came to the front door. When are car stopped someone closed the door of the cafe, dropped down and to the back of the room. When Officer Lickert came to the door the defendant was crouched in the back of the front room. Upon being asked what he was doing, he told Officer Lickert that everything was all right. However, Officer Lickert, who had previously drawn his gun, insisted on the door being opened. Upon entering they turned on a beer sign.

"It might be well to mention here that the cafe fronts north on St. Mary's avenue and is not exactly rectangular because of the diagonal direction of the avenue. The inside of the building is partitioned into two rooms, the front room being larger than the back, with two doors in the partition. The one door is on the east and just back of the bar and restaurant counter located in the east part of the front room. The other is in the west part of the partition just back of the booths located in the west part of the front room. The transom above the street door was open.

"When Officers Lickert and Elias entered the room, Tony Scavio, who was also in the building, had on his overcoat and hat and the defendant had on his hat and his overcoat and was near the door, lying over a cigarette machine. Just to the left of the door and between the counter and juke box, which was just on the left as you entered, was a five-gallon can,

similar to the one the defendant had purchased the previous afternoon, with the lid off and containing a small amount of gasoline. Gasoline was generally distributed over the bar and lunch counter, the floor, on top of and under the seats of the booths, and on the equipment back of the counter. Such things about the place as napkins, napkin holders, newspapers, rags and other miscellaneous items were soaked with gasoline. Standing in the open doorway of the west partition door was another can, similar to the one the defendant had purchased the previous afternoon, full of gasoline and with the lid removed. Neither lid of these two cans was found at the cafe. While the officers were there the defendant said he thought the gas was on and went back of the counter and apparently closed the jets on the gas stove. When the officers entered the room it was filled with gasoline fumes. Being asked how the gasoline got there, Scavio said he did not know, and the defendant kept still.

"Without being searched, the defendant and Scavio were both taken to police headquarters in the car of Officers Lickert and Elias. The defendant rode in the front seat on the right-hand side and Scavio in the back seat on the right-hand side and they both got out that side at the police station. Some five or ten minutes thereafter one of the officers discovered, near the right front fender of this car, two caps similar to those used on cans such as they found at the cafe, also a pair of gloves soaked with gasoline. Upon being searched they found the key of the car in defendant's shoe. The car the defendant had rented was found parked on Thirtieth Street, just south of St. Mary's Avenue. On the floor mat in front of the back seat were found heavy square indentation marks, the same as would be made by the cans found in the cafe, and some oily substance was on the mat around the marks.

"Evidence was offered by the defendant to show that the removal and exchange of fixtures was done

prior to the purchase of the insurance. Defendant admits that he purchased the two cans, but states that he purchased the same for Lawrence Scavio, who had asked him to do so several days prior to February 24, 1942. That Lawrence wanted him to leave them at the cafe in order that he might have them filled with gasoline, as he was going to drive a car from Chicago to the west coast and wanted to pick up some extra gasoline. Defendant testified he took the empty cans out to the cafe around 8:30 P. M. of the evening of the 24th, and gave them to Raymond C. Agosta. While there Agosta told him that Tony Scavio was going to take care of the cafe that evening and he would like to have him come out and help him. He told Agosta that he was busy the early part of the evening, but if he could he would come out later. That he returned later that evening, some time between 12:30 and 1:00 A. M. of the 25th. Upon arriving at the cafe he was immediately called to the back room by Tony Scavio and remained there during the entire time he was at the cafe. When he entered the cafe he did not observe either of the cans which were later found there. That Tony Scavio waited on business whenever anybody came in, but always returned to the back room, where they played pitch while he drank beer and Scavio drank whiskey. Customers came in and out until late in the night, when two men came in, who seemed to be considerably under the influence of liquor. Scavio waited on them and then they left, but shortly thereafter, between 2:00 and 2:30 A. M., one returned, and he and Scavio got into an argument. He heard some confusion in the front room, but did not go out. Scavio finally put the man out and came back to the room and told him that he had spilled something and got a rag to wipe it up. When he came back he told the defendant that some officers had just picked up the drunk. They then remained in the back room for some time, but at no time, while he was in the back room, did he smell any gasoline fumes. As they went to leave he walked

through the west partition door into the front room, where he noticed gasoline fumes for the first time. Scavio then told him that in the scuffle the customer had knocked over a can of gasoline and some had spilled out onto the counter and floor. Scavio had just turned out the back light and there was still a light burning in the front and that they had just opened the door and were about to leave when the officers drove up. He also testified they had just opened the transom and door to clean up the place.

"This is necessarily an abbreviated statement of facts contained in a lengthy bill of exceptions, but fairly presents the events that transpired during the course of February 24th and the early morning of February 25th, 1942, as disclosed by the evidence."

It wil be noticed that there was no fire set nor any burning of any kind testified to by anyone.

On March 16th, 1943, the jury found the petitioner guilty on Count 1 of the Information, to-wit: Arson in the Fourth Degree (R. p. 21). A "Motion for a New Trial" was filed within the statutory period of time (R. pp. 22 to 30, incl.), in which the petitioner's rights, as herein contended for, were fully preserved and same was overruled (R. p. 32). A "Motion in Arrest of Judgment" was filed thereafter upon the ground that "the facts stated in the Information do not constitute an offense," which Motion was made pursuant to the Nebraska law (R. p. 30), which was overruled.

The defendant was sentenced to two years' imprisonment in the Nebraska State Penitentiary (R. p. 31). A Notice of Appeal was filed (R. p. 33); "Application for Suspension of Execution of Sentence" was filed (R. pp. 33-34), together with bond (R. p. 33). A "Petition in

Error'' was filed, in which all of petitioner's rights, as herein contended for, were preserved (R. pp. 34 to 42, incl.).

After the Court rendered its Opinion on March 17th, 1944, affirming the judgment and sentence of the lower Court (R. pp. 97 to 116, incl.), a ''Motion to Stay the Mandate'' was filed (R. pp. 116-117) and an Order was entered staying same (R. p. 125). A Motion for Diminution of the Record and supporting affidavit were filed (R. pp. 117 to 120), and same was denied (R. p. 126).

Within the provided time, and as provided for by Nebraska law, a ''Motion and Brief for Rehearing'' was filed in the Supreme Court of Nebraska (R. pp. 121 to 125, incl.), which Motion was overruled on April 15th, 1944 (R. p. 125). This Motion, we believe, presented succinctly the exact questions now sought to be reviewed by this Court.

Within the three months' period provided for by the laws of the United States the record was transmitted to the Clerk of the Supreme Court of the United States for printing and by order of a Justice of the Supreme Court petitioner was granted until September 1st, 1944, to file his Petition for Writ of Certiorari and supporting Brief.

BASIS OF JURISDICTION

The jurisdiction of this Court is invoked:

(a) Under Section I of the 14th Amendment to the Constitution of the United States, which provides that:

> ''all persons born or naturalied in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they

reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State deprive any person of liberty * * * without due process of law;* nor deny to any person within its jurisdiction the equal protection of the laws."

(b) Under Section 237 of the Judicial Code, as amended, now Section 344, Title 28, U. S. C. A.

The judgment sought to be reviewed, as aforesaid, is the judgment of the Supreme Court of Nebraska, entered on March 17th, 1944, and which became final and appealable upon the overruling of the Motion for a Rehearing on April 15th, 1944.

QUESTIONS PRESENTED

1. Was the petitioner herein denied a speedy trial in violation of Section 1 of Article XIV of the Amendments to the Constitution of the United States relating to due process of law in the following particulars, and each of them?

(a) In that he was arrested without a warrant and no preliminary complaint was filed before the Examining Magistrate against him, for a period of two days, although Grenville P. North, counsel for the petitioner, demanded that a specific charge be filed or that the petitioner be discharged in the premises.

(b) In that the preliminary hearing before the Examining Magistrate in this case was not speedily held or given, but was unnecessarily delayed and prolonged, although repeated objections were made by Grenville P. North, Counsel for the petitioner, to con-

tinuances granted at the request of the State, and unnecessary delays were had on the part of the State in the conducting of said preliminary hearing.

(c) In that no trial was given the petitioner in the District Court of Douglas County, Nebraska, although repeated demands were made by petitioner and his counsel, Grenville P. North, to have said case tried with promptness and dispatch and said trial was continued from time to time and from court term to court term over the objections of said counsel for the petitioner, for a period of about one year, and no trial was accorded the petitioner until seven of his witnesses were absent from the jurisdiction of the Court and at least five of these seven were in the Armed Forces of the United States and two of his most important witnesses had died, and when Grenville P. North, the only attorney for the petitioner, was seriously ill, and in spite of said illness was compelled to proceed to try said case or surrender the defense of his client, at the inception of or during the trial, to some newly acquired counsel not yet procured, who, necessarily, would be unfamiliar with the facts in the case, and who would not have had any time prior to the actual trial of the case to familiarize himself with the case and formulate a trial plan.

2. Did the Information upon which the petitioner was prosecuted and convicted charge a crime and was his conviction violative of that portion of Section 1 of Article XIV of the Amendments to the Constitution of the United States relating to due process of law, in the following particulars, and each of them?

(a) It did not advise the petitioner of the nature and cause of the accusation made against him.

(b) It was incoherent, indefinite and uncertain.

(c) It was so lacking in clarity that no one could intelligently enter a plea to the same, and of necessity the petitioner was forced to stand mute.

(d) It was not alleged that the doing of the things charged in Count 1 of the Information, the Count upon which a conviction was had, were "contrary to the form of the statutes of the State of Nebraska in such cases made and provided, and against the peace and dignity of the State of Nebraska." (This allegation followed Count 2 of the Information, but petitioner was acquitted on that Count and this language in same could not be transplanted legally to Count 1.)

3. Was the Petitioner denied due process of law in violation of Section 1 of Article XIV of the Amendments to the Constitution of the United States in the following particulars, and each of them?

(a) In that he was never arraigned, as provided for by the laws of the State of Nebraska.

(b) In that no plea of "not guilty" was ever entered on the Information, as provided for by the laws of Nebraska.

(c) In that no legal arraignment of the petitioner was ever had.

4. Was the petitioner prevented from having a fair and impartial trial under law, in violation of Section 1 of Article XIV of the Amendments to the Constitution of the United States relating to due process of law in the following particulars, and each of them?

(a) In that no trial was accorded the petitioner in the District Court of Douglas County, Nebraska, until seven of his important witnesses were absent from the jurisdiction of the Court and in the Armed Forces of the United States, and his most important witness, Raymond A. Agosta, had died, and another important witness by the name of Joe Sullivan had died.

(b) In that petitioner was wrongfully denied a continuance because of the absence from the jurisdiction of seven of his said witnesses.

(c) In that when the case was finally called for trial, Grenville P. North, the only counsel for the petitioner, was seriously ill and his motion for a continuance on that ground, and also because of the absence of his witnesses, was wrongfully denied and he was compelled to proceed to try the case himself or to surrender the defense of his client to some newly acquired counsel who was not familiar with the facts of the case and who would not have had any time prior to the commencement of the actual trial to acquaint and familiarize himself with the case and formulate a plan of trial.

5. Was the statute upon which this prosecution and conviction was had, namely, Section 28-5,101, Comp. St. Supp., 1941, unconstitutional and null and void and in violation of Section 1 of Article XIV of the Amendments to the Constitution of the United States, in that the petitioner could not be accorded, under that statute, due process of law, in the following particulars, and each of them?

(a) Because no norm or standard of conduct is set up in said law.

(b) Because the ultimate operative fact presumed by said statute has no rational connection to the fact to be proved, and the statute provides for the inference of one fact from proof of another fact, which is so unreasonable as to be a purely arbitrary mandate.

(c) The presumption created has no relation in experience to general facts.

(d) Because the statute attempts to declare an individual guilty, or presumptively guilty, of a crime, and that is not within the province of the Legislature and conflicts with and tends to nullify the presumption of innocence.

(e) In that the said statute attempts to and does declare that to be a fact which is not a fact, and that to be true which is not true.

6. Was the evidence adduced by the State, as well as the evidence upon the whole trial, insufficient in law to sustain a conviction, and was the petitioner denied due process of law under Section 1 of Article XIV of the Amendments to the Constitution of the United States when the case was not dismissed pursuant to appropriate motions made to the Trial Court, or reversed and dismissed by the Nebraska Supreme Court?

REASONS RELIED UPON FOR ALLOWANCE OF WRIT

The discretionary power of this Court to grant a Writ of Certiorari is invoked upon the following grounds:

First—Because "due process of law" under Section 1 of Article XIV of the Amendments to the Constitution

of the United States contemplates that an arrested person have a preliminary complaint filed against him promptly, that he be given a speedy preliminary hearing, and that after being bound over for trial there be no unnecessary delays and that he be accorded a speedy trial on the merits. In the instant case the record discloses an utter disregard on the part of the prosecution to proceed with due dispatch until almost one year's time had elapsed and when two of the petitioner's most material witnesses had died, and two others were absent from the jurisdiction of the Court, and five other material witnesses were in the Armed Forces of the United States, and counsel for petitioners was very ill and had no opportunity to have co-counsel try the case or sit with him in said trial.

Second—Because "due process of law" under Section 1 of Article XIV of the Amendments to the Constitution of the United States contemplates that an accused person be advised in plain, understandable language of the nature and cause of the accusation made against him and his said rights are denied to him when he is called upon to plead to a vague, incoherent and non-informative charge.

Third—Because "due process of law under Section 1 of Article XIV of the Amendments to the Constitution of the United States requires that an arraignment should be had pursuant to established law and if the law requires same to be had in open Court then an arraignment in Chambers will not suffice and all of the law relating to the particulars of receiving and recording the plea of the defendant should be complied with.

Fourth—Because "due process of law" under Section 1 of Article XIV of the Amendments to the Constitution of the United States contemplates that a defendant, who at all times had exercised due diligence, should, upon

a proper showing, be granted a continuance and should not be forced into trial arbitrarily by a Court at a time when, through delay on the part of the State, two of his material witnesses for the defense had died, two were out of the jurisdiction, and five were in the United States Army, pursuant to the Selective Service Regulations, and defendant's counsel was ill. That a proper regard for the legal rights of a defendant should dictate that he be given an opportunity to secure the testimony of his living witnesses, either by their personal presence in Court or by their depositions, and that a defendant be privileged to be represented on his trial by a well, and not a lawyer who is seriously ill.

Fifth—Because "due process of law" under Section 1 of Article XIV of the Amendments to the Constitution of the United States contemplates that a defendant be prosecuted upon a valid statute wherein a norm or standard of conduct is set up with such definiteness and clarity so that one may be able to determine from a reading thereof that which is declared by the law to be unlawful, and no legislative enactment is constitutional where the ultimate operative fact presumed by the statute has no rational connection to the fact to be proved, and which provides the inference of one fact from proof of another fact which is so unreasonable as to be a purely arbitrary mandate. A statute which indulges in presumptions of guilt from certain conduct, or which provides that to be an attempted offense, which as a matter of fact is not an attempt to commit an offense, is an unconstitutional law.

Sixth—Because "due process of law" under Section 1 of Article XIV of the Amendments to the Constitution of the United States contemplates that before a de-

fendant may be convicted on direct evidence he must be proved guilty in the way and manner that the State law provides—that is, beyond a reasonable doubt, in Nebraska (Instruction No. 4, R. p. 5)—and if the evidence is circumstantial, as the instant case discloses, then he must also be proved guilty in the way and manner that the State law provides, that is, as stated by the trial Judge in Instruction No. 11 (R. pp. 18-19), by evidence "of such a conclusive and positive nature as to exclude to a normal certainty every rational hypothesis except that of defendant's guilt." If the evidence is insufficient as a matter of law no state has the right to pronounce or enforce a Judgment and Sentence on same.

PRAYER

Wherefore, your petition prays, that a Writ of Certiorari issue under the seal of this Court, directed to the Supreme Court of Nebraska, to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Supreme Court of Nebraska had in the case numbered Nebraska 31647, entitled, William Maher, Plaintiff in Error, vs. The State of Nebraska, Defendant in Error, —— Neb. ——, 13 N. W. (2d) 641, to the end that this cause may be reviewed and determined by this Court as provided for by the Statutes of the United States, and that the judgment herein of said Nebraska Supreme Court may be stayed and the petitioner be released on bail during the pendency of this appeal, and that the judgment of the Supreme Court of Nebraska may be reversed by this Court, and for such other and further relief as to this Court may seem proper.

EUGENE D. O'SULLIVAN, and
GRENVILLE P. NORTH,
Attorneys for Petitioner.

IN THE

Supreme Court of the United States

———o—o———

October Term, 1944

———o—o———

No.————————

———o—o———

WILLIAM MAHER,

Petitioner,

vs.

THE STATE OF NEBRASKA,

Respondent.

———o—o———

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

———o—o———

OPINION OF COURT BELOW

The opinion of the Supreme Court of Nebraska is reported in —— Neb. ——, 13 N. W. (2d) 641. No formal opinion in relation to any legal matters involved in the case was rendered by the trial Court.

JURISDICTION

The jurisdiction of this Court is invoked under:

(a) Section 1 of the 14th Amendments to the Constitution of the United States.

(b) Under Section 237 of the Judicial Code as amended, now Section 344, Title 28, U. S. C. A.

STATEMENT OF THE CASE

A rather complete statement of the case having been made in the Petition for the Writ of Certiorari under the heading, "Summary and Short Statement of the Matters Involved," we feel that it would serve no useful purpose to indulge in a restatement of those facts here.

SPECIFICATIONS OF ERROR

1. The petitioner was denied a speedy public trial in violation of Section 1 of Article XIV of the Amendments to the Constitution of the United States relating to due process of law in the following particulars, and each of them:

(a) In that he was arrested without a warrant and no preliminary complaint was filed before the Examining Magistrate against him, for a period of two days, although Grenville P. North, his counsel, demanded that a specific charge be filed or that he be discharged in the premises.

(b) In that the preliminary hearing before the Examining Magistrate in this case was not speedily held or given, but was unnecessarily delayed and prolonged, although repeated objections were made by Grenville P. North, his counsel, to continuances granted at the request of the State, and unnecessary delays were had on the part of the State in the conducting of said preliminary hearing.

(c) In that no trial was given him in the District Court of Douglas County, Nebraska, although

repeated demands were made by petitioner and his counsel, Grenville P. North, to have said case tried with promptness and dispatch and said trial was continued from time to time and from court term to court term over the objections of said counsel, for a period of about one year, and no trial was accorded him until seven of his witnesses were absent from the jurisdiction of the Court and at least five of these seven were in the Armed Forces of the United States and two of his most important witnesses had died, and when Grenville P. North, the only attorney for the petitioner, was seriously ill, and in spite of said illness was compelled to proceed to try said case or surrender the defense of his client, at the inception of or during the trial, to some newly acquired counsel not yet procured, who, necessarily, would be unfamiliar with the facts in the case, and who would not have had any time prior to the actual trial of the case to familiarize himself with the case and formulate a trial plan.

2. The Information upon which the petitioner was prosecuted did not charge a crime, and the conviction of the petitioner in this case is therefore violative of that portion of Section 1 of Article XIV of the Amendments to the Constitution of the United States relating to due process of law, in the following particulars, and each of them:

(a) It did not advise him of the nature and cause of the accusation made against him.

(b) It was incoherent, indefinite and uncertain.

(c) It was so lacking in clarity that no one could intelligently enter a plea to the same, and of necessity the petitioner was forced to stand mute.

(d) It was not alleged that the doing of the things charged in Count 1 of the Information, the Count upon which a conviction was had, were "contrary to the form of the statutes of the State of Nebraska in such cases made and provided, and against the peace and dignity of the State of Nebraska." (This allegation followed Count 2 of the Information, but petitioner was acquitted on that Count and this language in same could not be transplanted legally to Count 1.)

3. The petitioner was denied due process of law in violation of Section 1 of Article XIV of the Amendments to the Constitution of the United States in the following particulars, and each of them:

(a) In that he was never arraigned as provided for by the laws of the State of Nebraska.

(b) In that no plea of "not guilty" was ever entered on the Information as provided for by the laws of Nebraska.

(c) In that no legal arraignment of the petitioner was ever had.

4. The petitioner was prevented from having a fair and impartial trial under the law in violation of Section 1 of Article XIV of the Amendments to the Constitution of the United States relating to due process of law in the following particulars, and each of them:

(a) In that no trial was accorded him in the District Court of Douglas County, Nebraska, until seven of his important witnesses were absent from the jurisdiction of the Court and in the Armed Forces of the United States and his most important witness,

Raymond A. Agosta, had died and another important witness by the name of Joe Sullivan had died.

(b) In that petitioner was wrongfully denied a continuance because of the absence from the jurisdiction of his said witnesses.

(c) In that when the case was finally called for trial, Grenville P. North, the only counsel for the petitioner, was seriously ill and his motion for a continuance on that ground and also the absence of his witnesses was wrongfully denied and he was compelled to proceed to try the case himself or to surrender the defense of his client to some newly acquired counsel who was not familiar with the facts in the case and who would not have had any time prior to the commencement of the actual trial to acquaint and familiarize himself with the case and formulate a plan of trial.

5. The statute upon which this prosecution and conviction was had, namely, Section 28-5,101, Comp. St. Supp., 1941, is unconstitutional and null and void and in violation of Section 1 of Article XIV of the Amendments to the Constitution of the United States, in that the petitioner could not be accorded, under that statute, due process of law, in the following particulars, and each of them:

(a) Because no norm or standard of conduct is set up in said law.

(b) Because the ultimate operative fact presumed by said statute has no rational connection to the fact to be proved, and the statute provides for the inference of one fact from proof of another fact, which is so unreasonable as to be a purely arbitrary mandate.

(c) The presumption created has no relation in experience to general facts.

(b) Because the statute attempts to declare an individual guilty, or presumptively guilty of a crime, and that is not within the province of the Legislature and conflicts with and tends to nullify the presumption of innocence.

(c) In that the said statute attempts to and does declare that to be a fact which is not a fact, and that to be true which is not true.

6. The evidence adduced by the State, as well as the evidence upon the whole trial, was insufficient in law to sustain a conviction, and the petitioner was denied due process of law, under Section 1 of Article XIV of the Amendments to the Constitution of the United States, when the case was not dismissed pursuant to appropriate Motions made to the Trial Court, or reversed and dismissed by the Nebraska Supreme Court.

ARGUMENT

Point 1

The petitioner was denied a speedy public trial in violation of Section 1 of Article XIV of the Amendments to the Constitution of the United States relating to due process of law in the following particulars, and each of them:

(a) In that he was arrested without a warrant and no preliminary complaint was filed before the Examining Magistrate against him, for a period of two days, although Grenville P. North, his counsel, demanded that a specific charge be filed or that he be discharged in the premises.

(b) In that the preliminary hearing before the Examining Magistrate in this case was not speedily held or given, but was unnecessarily delayed and prolonged, although repeated objections were made by Grenville P. North, his counsel, to continuances granted at the request of the State and unnecessary delays were had on the part of the State in the conducting of said preliminary hearing.

(c) In that no trial was given him in the District Court of Douglas County, Nebraska, although repeated demands were made by petitioner and his counsel, Grenville P. North, to have said case tried with promptness and dispatch and said trial was continued from time to time and from court term to court term, over the objections of said counsel, for a period of about one year, and no trial was accorded him until seven of his witnesses were absent from the jurisdiction of the Court and at least five of these seven were in the Armed Forces of the United States and two of his most important witnesses had died, and when Grenville P. North, the only attorney for the petitioner, was seriously ill, and in spite of said illness was compelled to try said case or surrender the defense of his client, at the inception of or during the trial, to some newly acquired counsel not yet procured, who, necessarily, would be unfamiliar with the facts in the case, and who would not have had any time prior to the actual trial of the case to familiarize himself with the case and formulate a trial plan.

As has been pointed out specifically in the portions of the Record, heretofore quoted, there is no question but that from a time shortly after the petitioner was arrested, a number of demands were made by petitioner's counsel

for a speedy hearing and trial; that petitioner demanded a hearing and trial on many occasions; that every continuance which was had up to the time of the actual trial in the District Court was at the request of the State; that no trial was accorded the petitioner until about one year had elapsed, and not until seven of his witnesses had been called either to the Armed Forces of the United States, and were beyond the jurisdiction of the Court and its process, and two important witnesses had died; that the case was called for trial and tried when his attorney was ill, that whether intentional or not the State insisted upon and did try this case when the petitioner was in the worst legal predicament in which an accused could be found upon his day of trial; that a well grounded and proved right to a continuance—the defendant's first —was denied by the Trial Court, who seemed not to be solicitous about the rights of the defendant, but pretended to be interested in the condition of his counsel's health.

We find no cases which are analogous to the outrageous facts which are disclosed by this record.

The Constitution of the State of Nebraska guarantees to an accused in a criminal case the right to speedy public trial.

This guarantee arises under Article I, Section 11, Constitution of Nebraska, which is as follows:

> "In all criminal prosecutions the accused shall have the right to * * * a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed."

In *Critser vs. State,* 87 Neb. 727, 127 N. W. 1073, it is said:

> "Public justice requires that criminal trials shall be disposed of promptly. The certainty that justice will be done and the guilty convicted without unnecessary delay is more efficacious in the prevention of crime than are severe penalties. The federal Constitution has undertaken to guard the rights of the accused against unnecessary delay, and the fundamental law of this state has assured him protection against imprisonment without trial * * *." Const. Art. 1, Sec. 11.

We believe that it is axiomatic that a speedy trial, as existed at common law, and as guaranteed by the Constitution of the State of Nebraska, is one that takes place within a reasonable time.

At the outset of this discussion perhaps it might be apropos to trace the history somewhat of the guarantee of a speedy, public trial.

In the Magna Charta, 18th and 19th Provisions, Professor Creasy's Translation of the English Constitution, page 120, it is said:

> "18. Assizes of novel disseisin and of mort d'ancestor, and of darrien presentment, shall not be taken but in their proper counties, and after this manner. We, or, if we should be out of the realm, our chief justiciary, shall send two justiciaries through *every county four times a year,* who, with four knights, out of every shire by the people, shall hold the said assizes, in the county, on the day, and at the place appointed." (Italics ours.)

In the Magna Charta, 19th Provision, Professor Creasy's Translation of the English Constitution, page 120, it is stated:

"19. And if any matters cannot be determined on the day appointed for holding the assizes in each county, so many of the knights and freeholders as have been held at the assizes aforesaid, shall stay to decide them, as is necessary, according as there is more or less business."

Under the Magna Charta there were holdings to the effect that an accused must be tried within *three months* and not less than five or six months.

In *Harris vs. Municipal Court of the City of Los Angeles,* 209 Cal. 55, 285 P. 699, the Supreme Court of California, in its opinion, says:

"What is a 'speedy trial,' as these words are used in the Constitution? The Legislature in section 1382 of the Penal Code has declared that, unless a defendant in a felony case has been brought to trial within sixty days after the finding of the indictment or the filing of the information, the court must, in the absence of good cause shown for the delay, dismiss the prosecution. *Thus the Legislature, by necessary inference had said that a trial delayed more than sixty days without good cause is not a speedy trial,* and the courts have not hesitated to adopt and enforce the legislative interpretation of the constitutional provision."

In *Commonwealth vs. Sweetlik,* 19 Pa. Dist. 397, it is said:

"Each case must depend on its own facts and circumstances. But there must be no needless delay."

In *Crister vs. State,* supra, it is further said:

"In some cases more time is required in the interest of the public as well as the accused than is required in other cases. There is room for the exer-

cise of sound discretion on the part of the trial court, always bearing in mind that the right to a speedy trial is the constitutional right of any citizen who is accused of crime. *In practice it is not often found necessary to delay the hearing of the matter during two jury terms after indictment is found or information filed. The Legislature has fixed an absolute limit beyond which the trial cannot be delayed.*"

The Court further said on page 1074:

"The fact that no regular panel of jury was present at that term is not of controlling importance in a capital case which involves the life and liberty of the accused. * * * The September term of court therefore must be considered as one of the terms at which the court had jurisdiction of the offense."

It will be seen from the foregoing quotations that under the 18th and 19th Provisions of the Magna Charta it was considered that a speedy trial was one that took place within three months, and in any event, under the rulings, time would not be extended for over six months and when it is considered that at that time there were no methods of communication except signals that could be seen with the human eye, no methods of transportation except by horse, rowboats and sailboats, that it would be much more difficult to hold court in every county in England *four times a year,* and to have witnesses there for the trial of all persons charged with crime than it would be to hold court in the City of Omaha and in the Fourth Judicial District every two weeks.

The measure of a reasonable time then was three months. Why is it not the measure of a reasonable time now?

So also it will be seen that in the State of California, which is more than 900 miles long and some 300 miles

wide and which has many inaccessible places caused by mountainous terrain, *sixty days* was considered a reasonable time.

From the Pennsylvania case and the Nebraska case, *Crister vs. State,* supra, it would appear that a trial is never a speedy trial as contemplated by the Magna Charta, the common law, the Constitution of the United States nor the Constitution of this State if any unnecessary delay takes place.

Respectable legal authority has stated that whenever it appears that an unreasonable delay has occurred after arrest, in either holding a preliminary examination or in having the trial, without fault of the accused, the whole proceeding is rendered void from the beginning, and the arrest is void, and the Court is entirely without jurisdiction to enter either an order of commitment or a judgment and sentence.

In King's Bench case, *Davis vs. Capper,* 10 B. & C. 28, wherein a magistrate had committed for re-examination for a period of *fourteen days,* Lord Tenterden, C. J., says:

> "It appears, however, to us to be a far better opinion, that in a case like this, where the time is unreasonable, *the commitment is void from the beginning.*" (Italics ours.)

In *Crister vs. State,* supra, Judge Sedgwick says:

> "The federal Constitution has undertaken to guard the rights of the accused against *unnecessary delay,* and the fundamental law of this state has assured him protection against imprisonment without trial. * * * Const. art. 1, Sec. 11. In some cases

more time is required in the interest of the public as well as the accused than is required in other cases. There is room for the exercise of sound discretion on the part of the trial court, always bearing in mind that the *right to a speedy trial* is the constitutional right of any citizen who is accused of crime." (Italics ours.)

If the Court will bear in mind always that in spite of the continuous objection of William Maher a delay of over one year occurred from the time that William Maher was arrested until his case was assigned for trial in the District Court; and about thirteen months until the alleged sentence was pronounced; and that on the morning of March 8th, 1943, over a year after the plaintiff in error had been arrested, Raymond A. Agosta, whose property it was claimed was attempted to be burned, died; that while the case was pending in the District Court that there were many different juries and courts in session (R. p. 58); that week after week and month after month went by without any case being tried, or one or two criminal cases being tried in Court Room Number 1, while several of the law judges were without any work to do and there were juries called and available (R. p. 79); that during many months during which juries were in session in District Court the judges were without work to do and there was no reason whatsoever why this case could not have been tried, particularly since the defendants were demanding and insisting upon a trial (R. p. 80); and if the Court will also bear in mind that thousands of men during that period were being inducted into the Armed Forces of the United States and volunteering for service in the Armed Forces and moving to the immediate neighborhoods of various defense plants, and that among such men were several important wit-

nesses for the plaintiff in error, William Maher, it is the belief of the writers that the Court will immediately see that an unexplained unreasonable delay, considering all of the circumstances, took place, and that the petitioner, William Maher, was denied a speedy trial as contemplated by the Constitution of Nebraska, and Section 1 of Article XIV of the Amendments to the United States Constitution, and was effectively prevented from having process for the witnesses on his behalf, and did not in fact have a fair and impartial trial.

The Courts have held that it is the duty of the Court to release on habeas corpus a person who has been denied a speedy trial as guaranteed by Section 11, Article 1, of the Constitution of the State of Nebraska, and this is true whether the application is made before or after the completion of the delayed trial.

In the case of *State of Nebraska vs. Emma L. Koch,* Supreme Court No. 31451, although our Supreme Court did not write an opinion but the reasoning advanced in the appellee's brief in that case is applicable to the case at bar, and it will be discussed later on in this argument.

In the case of *Ex Parte Miller,* 66 Colo. 261, 180 Pac. 749, the Supreme Court of Colorado in its opinion says:

> "The undisputed facts show that the State has been highly remiss in this prosecution. There is no attempt to justify or explain the delay and we must conclude that none is possible. It was distinctively the duty of the prosecution to move in the matter. The State having placed the incubus of a criminal charge against the defendant, it cannot now be permitted to indefinitely hold this cloud over him and unreasonably and unnecessarily delay action. To

do this is clearly in violation of the constitutional guarantee of a speedy trial.

"The motion to quash the writ (of habeas corpus) will therefore be denied, the defendant is ordered discharged from custody, and the district court of Weld County directed to dismiss the indictment."

This case shows beyond all question that habeas corpus is a potent remedy against unreasonable delays in trial.

The opinion in the case of *Commonwealth vs. Sweetlik,* 19 Pa. Dist. 397, is to the same effect. This Pennsylvania Court held that habeas corpus is the proper remedy to reach unreasonable delay, stating as follows:

"* * * *The defendant is now before us on a writ of habeas corpus, and we are asked to discharge him from custody.* No satisfactory reason whatever has been assigned why the defendant was not given a preliminary hearing and his case returned to court prior to the meeting of the June grand jury. We have been asked by the district attorney and by counsel for the defendants, in deciding this case, to give some expression of opinion as to the law *governing the matter of preliminary hearings and returns to court in criminal cases.*

"* * * The important question here is as to the time in which the defendant shall have been given a preliminary hearing. *The theory of the law is that he shall have a hearing immediately.* In many cases this is impossible in practice, inasmuch as the Commonwealth's witnesses may not be present when the defendant is arrested and first brought to the office of the justice. All that can be said is that the defendant must be given a preliminary hearing *just as soon as* the nature and circumstances of the particular case will permit. It was formerly supposed that three days was a sufficient time within which the committing magistrate should conduct the

examination or hearing and render his decision. There is no such legal limit: *McKinley's Justice* (4th Ed.), 232. Each case must depend on its own facts and circumstances. *But there must be no needless delay.* If necessary, the hearing may be adjourned from time to time, but it must be concluded promptly. *Wharton's Criminal Pleading and Practice* (9th Ed.), S. 70. *And, above all, the defendant must be given a preliminary hearing before the next meeting of the grand jury following his arrest,* unless there is some pressing reason to the contrary. Cases may arise where there is sufficient reason for not giving the defendant a hearing before the next meeting of the grand jury, but they are exceptional. * * *

"To sum up the whole matter, a preliminary hearing *must be given the defendant as soon as reasonably practicable* after his arrest, and *before the next meeting or during the next session* of the grand jury, unless some pressing reason appear why such hearing cannot be given * * *."

"The defendant will be discharged."

In the case of *Davis vs. Capper,* supra, Lord Tenterden explains that where once shown that the prisoner has been held an unreasonable time or is committed for preliminary hearing for an unreasonable time, the commitment is void from the beginning, stating:

"This was an action of trespass for false imprisonment against a magistrate, who had committed the plaintiff for re-examination for a period of *fourteen* days * * *. In appears, however, to us to be far the better opinion, that in a case like this, where the time is unreasonable, *the commitment is void from the beginning.* The duty of a magistrate is to commit for a reasonable time, and if he commits for an unreasonable time, *he thereby does an act he is not authorized by law to do.* In the case of Rex vs. Good-

> ing, (a) the judges thought that a commitment for an unreasonable time would be a *void* commitment. For it is stated in the report, that 'they (the judges) presumed that it must have appeared at the trial, that the time was reasonable, as otherwise *he* (*the rescuer*) *ought to have been acquitted.*' That goes to the very point, that a commitment for re-examination, if it be for an unreasonable time, is therefore *wholly void.* For the Judges were of the opinion that the party so committed *was not in lawful custody,* and therefore, *that another who had aided such person in escaping from prison was not guilty of any offense against the law* * * *."

It is our claim that the Constitutional provision which guarantees speedy trial to the accused is a self executing constitutional provision, and although the Legislature of the State of Nebraska has partially implemented Section 11, Article 1 of the Constitution by means of a statute which provides that if an accused on bail is not brought to trial before the end of the third term of the Court in which the cause is pending, said accused shall be entitled to be discharged, nevertheless such statute can only implement and not restrict the constitutional provision, and if in fact applicant's trial could have been had within three months or even a lesser time after the constitutional provision has been violated, it is the duty of the Court to discharge the defendant and dismiss the case.

In 16 C. J. S. 119, it is said:

> "Provision that accused shall have the right to a speedy and public trial is self-executing."

In *Harris vs. Municipal Court of City of Los Angeles,* supra, the Supreme Court of California, in its opinion, says:

> "Section 13 of article 1 of the Constitution of California provides in part as follows: 'In criminal prosecutions, in any court whatever, the party accused shall have the right to a speedy and public trial.' This provision of the Constitution is self-executing. In Re Alpine, 203 Cal. 731, 265 Pac. 947, 58 A. L. R. 1500; In re Begerow, 133 Cal. 349, 65 P. 828, 56 L. R. A. 513, 85 Am. St. Rep. 178. It reflects the letter and spirit of the following provision of the Federal Constitution to the same effect: 'In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial. * * *.' U. S. Const., Amend. art. 6, sec. 1. This is a fundamental right granted to the accused, and has been the policy of the law since the time of the promulgation of Magna Charta and the Habeas Corpus Act * * *."

The fact that accused is not incarcerated but is permitted to move at large under bail, does not derogate in any way from accused's constitutional right to a speedy trial.

In 22 C. J. S. 715, it is stated:

> "The constitutional guarantees of the right to a speedy trial extend to all persons accused of a criminal offense. Incarceration is not essential to its operation * * *."

In *Harris vs. Municipal Court of City of Los Angeles*, supra, it is said:

> "The respondents contend that during the period of the delay petitioner was not incarcerated. * * * But incarceration is not essential to the question of the constitutional guarantee."

There are authorities to the effect that when an accused has been denied his constitutional right to a speedy

trial, he is absolutely entitled to be discharged, and no Court has the power in its discretion to refuse to dismiss the case against him.

In 16 C. J. 433, it is said:

> "Party charged with crime has the constitutional right to a speedy trial, and the court has no discretionary power to deny him a right so important, or to prolong imprisonment, without such trial, beyond the time provided by law. The statute is imperative; and if the accused shows that he comes within its provisions, and the trial has not been postponed on his own application, he should be discharged."

In 22 C. J. S. 714, it is stated:

> "The right to a speedy trial is absolute and is not subject to the discretionary power of the courts, and is of such substantiality that no technical objection to the procedure whereby relief is sought should preclude it being enforced."

In *Harris vs. Municipal Court of City of Los Angeles*, supra, it is said:

> "Commenting on section 13 of article 1 of the Constitution and section 1382 of the Penal Code, this court, in People v. Morino, supra, at page 517 of 85 Cal., 24 P. 892, 893, said: 'A party charged with crime has the constitutional right to a speedy trial, and the court has no discretionary power to deny him a right so important. * * * The statute is imperative. 'The court, unless good cause to the contrary is shown, must order the prosecution to be dismissed.' * * *'"

It has also been held that when a speedy trial has been denied to an accused, the accused need not affirma-

tively show prejudice, in order to be entitled to a discharge.

In *Harris vs. Municipal Court of City of Los Angeles*, supra, it is said:

> "Furthermore, it is not necessary that the party accused affirmatively show prejudice. Prejudice will be presumed from the violation of this constitutional right. It is enough for the defendant to show that the prosecution has been unreasonably delayed. * * *"

As already stated, the petitioner was arrested February 25th, 1942, and on the 8th day of March, 1943, had not been tried. For more than a year the State procrastinated, and although accused was at all times ready, willing and eager to present his defense, and although the State must have known that many of the witnesses on behalf of the accused were liable to be taken beyond the jurisdiction of the Court's process, no excuse is offered by the State for this extraordinary delay.

In the case, *State vs. Emma L. Koch*, hereinafter discussed, the delay was over two years, but the country was not at war and it was not apparent that the defendant suffered any actual detriment to her constitutional right to call witnesses to testify on her behalf before they had gone beyond the jurisdiction of the Court or had died; while in this case William Maher's two most important witnesses had died and practically all of his witnesses, who would have testified on his behalf had he received the speedy trial guaranteed to him by the Constitution, were beyond the jurisdiction and beyond the process of the Court when the case finally came on for trial.

The Legislature of the State of Nebraska, recognizing the importance of the citizen's traditional right to prompt trial under the law of both America and England, sought to implement the constitutional guarantee of speedy trial by enacting an executing statute, the applicable section of said statute being Section 29-1203, Compiled Statutes of Nebraska, 1929. By passing this statute, the Nebraska Legislature provided that under no circumstances could the accused be tried after the end of the third term of court in which the case was pending, unless the delay happened upon accused's application or unless there was want of time to try such case at such third term.

A great many states have passed executing statutes implementing the constitutional provision for a speedy trial, fixing a time limit in days beyond which no prosecution may be had for any reason unless good cause be shown by the state excusing the delay.

The Nebraska Legislature has never passed any executing statute implementing its constitutional provision limiting the time of prosecution to days, but in the case of *State of Nebraska vs. Emma L. Koch,* General Number 31451, the lower Court held that no such executing statute was necessary, but that the Constitution itself was self-executing, and that if the prosecution was not completed within a reasonable time, no prosecution could be had. This Court dismissed the appeal in that case without any opinion. So, necessarily, in order to determine the reasoning which actuated the Supreme Court in approving the dismissal, and we must go to the brief anl argument of the appellee in that case, written by the late Major Gleason to learn same.

From it we find that the State contended that as long as three terms of court had not gone by (from the time of filing of Information) as provided in Section 29-1203, Comp. Stat. Neb., 1929, then, no matter what the other facts and circumstances were, including whether or not the State had unreasonably delayed the filing of the Information, nothing further could be done to enforce the constitutional mandate and that the accused was not entitled to any redress. Concerning this contention, Major Gleason says:

> "The state's contention in this connection is easily punctured. It is just about the most amazing 'reductio ad absurdem' that one is likely ever to encounter in legal argument. If this theory of the state be accepted as valid, then a citizen of Nebraska has no protection whatever against the harassment of a postponed prosecution, and the constitutional guarantee of speedy trial is a mere form of words, devoid of all practical benefit and effect.
> * * *
>
> "This idea that the state can indefinitely suspend a Sword of Damocles over the head of American citizens—is intolerable and absurd.
>
> "The answer is, of course, that the state's contention is unfounded in law; and there is a decision in the Supreme Court of California, on facts exactly parallel with the facts of the present case, which will, we trust, determine this argument in favor of the accused. The California case referred to is *Harris vs. Municipal Court of City of Los Angeles*, 209 Cal. 55, 285 P. 699. In that case we find the following situation: The California Constitution provided for the right of speedy trial; the California Legislature had passed an executing statute requiring that trial not be delayed more than sixty days in felony cases—which would, of course, relate specifically to terms in district court and

would not, by its terms, relate specifically to misdemeanor trials, either in municipal courts or the superior courts of California. Thereupon a case arose in which a misdemeanor trial in California superior court had been delayed for a length of time greater than sixty days. The accused moved for dismissal of the action; the motion was denied and accused applied to the California District Court of Appeal for a writ of mandate. The court of appeal decided, not in so many words, but in effect, that the enacting statute, although by the statute's language said statute applied only to district court felony cases, nevertheless set a standard for misdemeanor cases in superior court by virtue of the existing constitutional guarantee of speedy trial. Later a second case came up—even more precisely akin to the case at bar—and this second case definitely decided the problem so far as the problem existed in the State of California, and, we trust, so far as the problem exists in the State of Nebraska. In *Hackel v. Municipal Court of City of Los Angeles*, 209 Cal. 780, 285 P. 704, a misdemeanor complaint was filed in municipal court and more than sixty days elapsed before the case came to trial. The accused brought mandamus in the Supreme Court of California to secure a dismissal of the charge. The California Supreme Court deliberated fully and cogently upon the question of the interrelation of the constitutional guarantee, the statute setting the sixty day limit in district court, and the position of the accused as a municipal court defendant. Having fully considered the question, the California Supreme Court came to the conclusion that the constitutional guarantee of speedy trial is a self-executing constitutional provision; that no legislative enactment or statute is required in order to give that guarantee force and effect; that if the Legislature passes a statute which defines unreasonable delay in connection with the matter of speedy trial, but has special application only to one court, for instance the district court—then the rights of the accused will be

protected, not only in the district court, to which the statute specifically applies, but also in every other criminal court where a complaint can be filed, be that other court municipal or superior; and the district court statute, regarded for all purposes as a definition of unreasonable delay, will be used as a standard for determining when a prosecution has been delayed in the other courts. That is to say, since the California statute defined unreasonable delay as sixty days in connection with felony prosecutions in district court, sixty days would be taken as the time limit on prosecutions in both municipal court and superior court, where misdemeanors are handled. The language of the California Court is so clear and so convincing that it will bear repetition here. The Court said:

> " 'What is a "speedy trial," as those words are used in the Constitution? The Legislature in section 1382 of the Penal Code has declared that, unless a defendant in a felony case has been brought to trial within sixty days after the finding of the indictment or the filing of the information, the court must, in the absence of good cause shown for the delay, dismiss the prosecution. *Thus the Legislature by necessary inference had said that a trial delayed more than sixty days without good cause is not a speedy trial,* and the courts have not hesitated to adopt and enforce the legislative interpretation of the constitutional provision. Nor have the courts hesitated, by writ of mandamus or on appeal, to compel the dismissal of felony cases not speedily brought to trial in accordance with the legislative interpretation. Ford v. Superior Court, 17 Cal. App. 1, 118 P. 96; Abbott v. Superior Court, 17 Cal. App. 13, 118 P. 100; People v. Morino, 85 Cal. 515, 24 P. 892. Furthermore, said section 1382 has been applied and enforced by writ of mandamus in the case of a misdemeanor charge in the superior court. Cordts v.

> Superior Court, 53 Cal. App. 589, 200 P. 726. *We have been referred to no statute or case, and we have found none in this state, compelling the dismissal of a misdemeanor charge in a court inferior in jurisdiction to the superior court, but no reason appears to justify a refusal to enforce the self-executing provision of the Constitution in such a case. The Constitution says that in criminal proceedings, in any court whatever, the party accused shall have the right to a speedy trial.* The respondent court is a court of record provided for in the Constitution.' "

If, in the California case, the delay of only *sixty days* was a violation of the constitutional provision guaranteeing a speedy trial, and if at common law under the Magna Charta a delay of over *ninety days,* and under no circumstances of over six months, was a violation of the provision guaranteeing a speedy trial, and if in the case of *State of Nebraska vs. Emma L. Koch,* supra, the delay of approximately fifteen months (where no prejudice was shown except the bare delay, while in this case it appears beyond all question that on account of the violation the petitioner was prevented from having his constitutional right for process to have his witnesses testify on his behalf), it seems to the writers that a period of over one year in this case, when unexplained in any manner, is too long, and is a violation of the constitutional provision guaranteeing the plaintiff in error a speedy trial, which, not only Major Gleason, but almost every Court that has spoken on the matter, says is self-executing and needs no statutory enactment to compel its enforcement.

We further claim that where there is a constitutional guarantee of speedy trial and the Nebraska Legislature

in pursuance thereof has enacted a statute (29-1203, Comp. St. 1929) providing:

> "If any person indicted for an offense who has given bail for his appearance, shall not be brought to trial before the end of the third term of the court in which the case is pending, held after such indictment is found, he shall be entitled to be discharged, so far as relates to such offense, unless the delay happened on his application, or be occasioned by the want of time to try such cause at such third term."

and where it appears that a delay of over one year occurred over his continuous objection, from the time that the person was arrested until his case was assigned for trial in the District Court and where it appears that such delay was an unreasonable delay, then it is the duty of the Court to release and discharge defendane even if the trial began before the time fixed by the legislative enactment, as otherwise the legislative enactment would restrict and nullify the constitutional provision, which is supreme.

In *People vs. Molinari,* 23 Cal. App. (2d) 761, 67 P. (2d) 767, the reporter syllabus and the Supreme Court of California, in its opinion, says:

> "Where case comes within statute defining maximum periods beyond which, in absence of proper excuse, trial is not speedy, court is bound, upon accused's application, to dismiss proceedings unless good cause to contrary is shown, *but is equally bound to dismiss proceeding upon accused's demand if he has in fact without reasonable ground been denied speedy trial, irrespective of whether statute applies* * * *.
>
> "In the case of Harris vs. Municipal Court (1930), 209 Cal. 55, at page 62, 285 P. 699, 701, the Supreme

Court said: 'We have been referred to no statute or case, and we have found none in this state, compelling the dismissal of a misdemeanor charge in a court inferior in jurisdiction to the superior court (subdivision 3 was added to section 1382, Penal Code, in 1931 (St. 1931, p. 2479)), but no reason appears to justify a refusal to enforce the self-executing provision of the Constitution in such a case. The Constitution says that in criminal proceedings, *in any court whatever,* the party accused shall have the right to a speedy trial.' Section 681a of the Penal Code, which is applicable to criminal proceedings in all courts, declares: 'The welfare of the people of the State of California requires that all proceedings in criminal cases shall be heard and determined at the earliest possible time. It shall be the duty of all courts and judicial officers * * * to expedite the hearing and determination of all such cases and proceedings to the greatest degree that is consistent with the ends of justice.' Section 1382 of the Penal Code, as amended, is designed to aid in carrying out the mandate of the Constitution by defining maximum periods beyond which (in the absence of proper excuse) a trial is not speedy but in ultimate analysis the right is that declared by the Constitution. If the case comes within the statute (section 1382, Penal Code, as amended), then clearly the court is bound, upon application of the defendant, to dismiss the proceedings 'unless good cause to the contrary is shown' *but so also is the court equally bound to dismiss the proceedings upon demand of the defendant if he has in fact without reasonable ground been denied a speedy trial,* irrespective of whether the case does or does not come within the somewhat mechanical operation of said section 1382."

So also to the same effect, is the case of *State vs. Keefe,* 17 Wyo. 227, 98 P. 122, 22 L. R. A. (N. S.) 896, 17 Ann. Cas. 161, wherein the Supreme Court of Wyoming, in its opinion, says:

"* * * It is true that none but a pending constitutional question may be reserved and sent to this court for decision upon the order of a district court. Rev. St. 1899, Sec. 4276, as amended by chapter 72, p, 78, Sess. Laws 1902. But the questions here reserved are clearly constitutional, for they involve the constitutional right of accused in a criminal prosecution to a speedy trial, which right is claimed to have been violated in this case. The statute supplements the constitutional provision, and secures or provides a method for securing the right thereby declared. It is to be regarded as enacted for the purpose of rendering the constitutional guaranty effective, *and as a legislative declaration of what is and what is not, under the circumstances, a reasonable and proper delay in bringing an accused to trial in respect of his constitutional right aforesaid.* The authorities uniformly hold that such statutes are enacted for the purpose of enforcing the constitutional right, *and that they constitute a legislative construction or definition of the constitutional provision*—a provision incorporated in most of the state Constitutions, as well as in the Constitution of the United States. Newlin v. People, 221 Ill. 166, 77 N. E. 529; Cummins v. People, 4 Colo. App. 71, 34 Pac. 734; State v Kuhn, 154 Ind. 450, 57 N. E. 106; In re McMicken, 39 Kans. 406, 18 Pac. 473; Benton v. Commonwealth, 91 V. 782, 21 S. E. 495." (Italics ours.)

For the purpose of applying the constitutional guarantee of speedy trial, delay on the part of the State is computed from the time of the arrest and the filing of the complaint. The constitutional time limit comprehends and embraces the whole process of prosecution dating from the moment the legal threat of the State is first felt against the accused and including the preliminary examination.

In the case of *State of Nebraska vs. Emma L. Koch,* Supreme Court No. 31431, heretofore referred to, it will

be remembered that the lower Court dismissed and discharged the defendant when it developed that she had not received a speedy trial.

In this case the Court still insisted upon proceeding after the motion to dismiss on the same ground, had been made.

We believe that this Court will be helped materially by a reading of this motion. Same is not set out in this brief because it has already increased to great size, but it is to be found in the printed Record in this case at pages 91 to 93, inclusive.

In this case it appears that the petitioner was arrested and held in jail for two days without any complaint having been filed against him; that he was held from the 27th day of February until the 5th day of March before beginning the preliminary examination which was again delayed and continued until the 13th of March, 1942; that no information was filed until the 17th day of March, 1942, and trial was not finally commenced until over a year after the arrest, during which time the witnesses, Lawrence Scavio, Mike Scavio, Harry Ostrom, William Joseph, Emmet Gardner, Harry Kane and Rudolph Bruhn, had been inducted into the Armed Forces of the United States and been taken beyond the jurisdiction of the process of the Court, and the witnesses, Raymond A. Agosta and Joe Sullivan were dead, and this testimony on behalf of the defendant could never be had, while no injury was shown in the Emma Koch case except that she had been placed under the harassment caused by the delay. If the Court will bear this in mind, we believe that it will see, as the writers do, that the reasoning of the late Major Gleason, as herein

set forth, is equally applicable to this case, and in fact compels the discharge demanded by William Maher. Believing this to be true we again quote verbatim from Major Gleason's brief as follows (page 14 of his brief):

> "The law, criminal as well as civil, is, in the ultimate analysis, nothing other than the distillation of considered human experience and sound common sense. As helpful a standard as can be found, in first approaching a legal question, is to ask: 'Is the given contention reasonable? Does it sound like good logic to the normal, intelligent man?' Let us use this initial method in connection with the state's theory on this particular point.
>
> "First of all, what is the individual right which we know the constitutional guarantee of speedy trial was designed to protect? Clearly, it was the right of the citizen to be guarded against the anxiety, menace and harassment of a delayed and suspended prosecution. That anxiety, that threat and harassment begin, in a legal sense, the moment the machinery of the state's criminal law begins to move against the citzen. Up until the time that machinery starts to move, the freedom of the individual is legally intact. The moment, however, that the complaint is filed, the individual becomes labeled as one whom the criminal authority of the state has, with alleged cause, marked out at least temporarily as an object of the state's reprisal. The menace of delayed prosecution is what the constitutional guarantee, in the light of its historical origins, was designed to eradicate; the rule was laid down that the whole prosecution, if completed at all, must be brought to a conclusion with promptness and diligence; and the complaint, the preliminary hearing, are, from the standpoint of the affected citizen, just as much a part of the process of prosecution, partake just as much of its nature of discredit and threat, as do the subsequent steps in the ordeal. It is a suspended prosecution which the free citizen

abhors, and the term is all-inclusive—not merely a suspended trial after bindover. Her right is to remain free from the continued harassment of the criminal authorities. Who will be found to say that a defendant on bail awaiting her preliminary examination is not in a position of harassment and uncertainty?

"As a matter of fact, courts have indeed spoken on this matter; and where they have spoken on it precisely, they have expressed themselves unequivocally in favor of defendant.

"In *In re Peoples,* 47 Mich. 626, 14 N. W. 112, the accused was complained against and committed. The preliminary hearing was delayed a month. Accused sued out a writ of habeas corpus in the Supreme Court, not on the ground of delay, but on the ground that there was no probable cause, thus asking the Supreme Court, in effect, to act as the preliminary examining tribunal in the case. The Supreme Court refuses to be pressed into any preliminary adjudication of the case on its merits; but the court, on its own initiative, severely condemns the delay and orders that bail be allowed to accused. Marston, Jr., in one of the opinions filed, deals with this delay, and says:

> " 'Where the respondent is not admitted to bail, either because the offense is not bailable, or he is unable to procure bail, there should be no delay on the part of the prosecution in proceeding with the examination, except as may be necessary to procure the attendance of witnesses. The constitution gives him the right of a speedy trial, and this, in my opinion, covers, also, the examination. This right is superior to any question of the mere convenience of public officers, and the investigation should commence at once unless the accused asks for delay. In this case I think the delay was unreasonable.'

"Could there be any more definite judicial expression of the rule that the constitutional guarantee of speedy trial covers the whole prosecution from complaint to judgment?

"In *Ex Parte Chambers,* 32 Cal. App. 476, 163 P. 223, the accused was committed under three processes: two ordinary warrants issued by a justice of the peace and one bench warrant under an indictment found by the grand jury. The preliminary hearing which should have taken place under the two ordinary warrants issued by the justice of the peace was delayed a month. Accused sued out habeas corpus, claiming a discharge. The California District Court of Appeals held that the accused could still properly be continued in confinement by virtue of the bench warrant, thus rendering unnecessary a decision on the effect of the delay in preliminary hearing under the two ordinary warrants. Speaking, however, of this delay in the preliminary hearing under the two ordinary warrants, the court makes its stand known in the following strong language:

> " 'We deem it unnecessary to decide whether said warrants issued by the justice of the peace became inoperative and void by reason of the failure and refusal to bring on the preliminary examination. We may remark, however, as to this, that while the statute does not prescribe the number of days after the information is laid before the committing magistrate within which the preliminary examination must be begun, yet both in letter and spirit it is opposed to such unreasonable delay as occurred herein. It has often been said, and it will probably be advisable many times to repeat it, that a person charged with crime has certain rights guaranteed by the constitution and statutes that even a district attorney is bound to respect. No one should be detained in prison indefinitely or capriciously in order that a case may be developed in the future

> or circumstances arise that will justify a trial and probably afford sufficient ground for conviction. The interests of society do not demand and the rights of the individual forbid such invasion of personal liberty.'

"Obviously, when the court, in the passage above quoted, speaks of 'certain rights guaranteed by the Constitution,' it is referring in particular to the constitutional right to a speedy trial, since it was this constitutional right alone—on the facts of the case—which was impaired by the conduct of the state in delaying the preliminary hearing—the conduct which the court is so vigorously and bluntly condemning in the opinion. In fine, then, the accused's constitutional right to a speedy trial was violated when the state postponed the preliminary hearing. The constitutional guarantee covers the whole gamut and duration of the prosecution from start to finish.

"There is a further case which serves to clinch the issue. In *Commonwealth v. Hottinger,* Pa. D. & C. 440, supra, a Pennsylvania case, the accused, driving a motor car, was alleged to have struck and run down two people, thereafter fleeing the scene of the accident. Accused was arrested and committed. Pennsylvania statute provided that an accused was entitled as a matter of strict right to a preliminary hearing in a criminal case. Yet the state could not bring the accused to preliminary hearing at once because the two injured witnesses were so badly hurt as to be unable to appear and testify. The constitution of Pennsylvania contained the usual constitutional guarantee of speedy trial. The accident happened on Sept. 2, 1936; *The grand jury was to meet on Dec.* 7, 1936. An attentive reading of the opinion will disclose that the district attorney was confronted with a baffling dilemma in this situation. The preliminary hearing statute required that he give accused, as a matter of right, a preliminary hearing—yet the constitutional guarantee demanded that, *preliminary hearing*

or not, he complete the whole prosecution promptly. Conscious of this dilemma, the district attorney chose to do the *lesser evil*—he chose to obey the *constitutional guarantee.* He therefore brought accused before the grand jury on Dec. 8th, and had accused indicted, *although he had not given accused a preliminary hearing beforehand at all.* The Pennsylvania court, commenting on this conduct, recognizes the dilemma involved, and asys:

> " '*Defendant was entitled to a prompt trial* and the district attorney properly brought the bill of indictment before the next grand jury, although there had been no preliminary hearing * * *.'

"Notice the force of this language, the amount of law packed into this one little sentence. The compelling authority of the constitutional guarantee of speedy trial is viewed by the court as being so comprehensive and so vital that the court commends a district attorney's respecting the constitutional guarantee even if, in so doing, the district attorney infringes upon another, and subordinate, right of accused—the statutory right to have a preliminary hearing before indictment. Notice also how the court regards the constitutional guarantee as embracing *the whole process of prosecution,* how the court endorses the district attorney's realization that he must act fast and diligently in completing the whole prosecution—else forfeit the power to act at all. If the Pennsylvania district attorney had conceived the law as being what the prosecutors of Douglas County argue to this court that the law is, he would have reasoned like this: "The constitutional guarantee doesn't begin to take effect until after the preliminary hearing. Therefore there is nothing to prevent my delaying the preliminary hearing as long as I want to. I don't have to worry about the *constitutional guarantee until after I have the accused indicted.*

"I can just 'take my time.' On the contrary, the Pennsylvania district attorney was all too keenly aware of the meaning and force of the constitutional provision. He knew that he must complete his prosecution swiftly, must move along with speed and diligence. Confronted, then, with the above mentioned dilemma, he chose to obey the constitutional guarantee rather than the statutory enactment which, on the facts of the case, conflicted. And the court realizes what the situation was and compliments him for his sagacity. Surely, here is answer enough to anyone who argues that the constitutional guarantee does not embrace the period between complaint and preliminary hearing."

We contend that wholly independent of the constitutional gauarantee, it is the law of both America and England that where a statute confers upon the accused the right to a preliminary hearing and does not mention the time within which the hearing must be held, then the preliminary hearing itself must be held promptly, and any undue delay on the part of the State in bringing accused to preliminary hearing, in and of itself all apart from the constitutional guarantee, entitles accused to be discharged.

We continue to quote from Major Gleason's brief, in the case of *State of Nebraska vs. Emma L. Koch*:

"Our Nebraska statutes give an accused the right to a preliminary hearing, to a *quick* preliminary hearing. S. 29-504 of our statutes reads as follows:

" 'Extra-jurisdictional offense, *Speedy* preliminary Inquiry into Complaint. That when the complaint if (is) for a felony, or for an offense for which the punishment may exceed three months imprisonment, or a fine of one hundred dollars, or both, upon the accused being brought

before the magistrate, he shall proceed as soon as may be, in presence of the accused, to inquire into the complaint.'

"Now, where statute has created for a defendant the right to a preliminary hearing, the clear law is that, where the statute does not mention a precise time, the hearing must be held as soon as possible; and that in default thereof the accused is entitled to be discharged."

Wharton: Criminal Pleading and Practice, 8th ed., Sec. 70, says:

"The delinquent having been arrested, the next step is to have the case heard before a magistrate or justice of the peace. It is not essential that the hearing should take place at once. The arresting officer may, if requisite, put the person arrested in the county prison, or other place of temporary confinement, until a hearing can be secured. *But this should be with all possible dispatch;* should there be any undue delay, a justice of the Supreme or any Superior Court having jurisdiction for the purpose, may, by writ of habeas corpus, exact an immediate examination before himself. And the issue of such a writ, on due cause shown, is obligatory. It has also been said that if the commitment be for an indefinite or unreasonable time, *the warrant is virtually void, and an action for trespass lies for the imprisonment* * * *."

16 C. J. 321 reads as follows:

"But where accused has the right to a preliminary examination, he is entitled to such an examination as soon as the nature of the case will permit and without any avoidable delay. It has been held that defendant must be given a preliminary hearing before the next meeting of the grand jury following his arrest unless there is some pressing reason which

requires delay. A commitment for an indefinite time, in order that the *prosecution may prepare the case against him and procure evidence, is improper; and his discharge properly may be ordered if the prosecution delays unreasonably to have the examination completed, and he is confined to jail.*"

"The rule of the criminal law that a preliminary hearing itself must be prompt was first laid down, to our knowledge, in England during the reign of Queen Elizabeth, in the case of *Scavage vs. Tatcham*, Cro. Eliz. 829, 78 Rep. 1056.

"In *Wright vs. Court*, 107 Re. 1182, decided in 1825, the opinion of the Court of King's Bench reads as follows:

> "'The plaintiff alleges that he was imprisoned for three days * * *. *It is the duty of the person arresting anyone on suspicion of a felony to take him before a justice as soon as he reasonably can* (a), *and the law gives no authority even to a justice to detain a person suspected, but for a reasonable time till he may be examined.* * * * Judgment for plaintiff.'

"In a subsequent King's Bench case, *Davis vs. Capper*, 10 B. & C. 28, Lord Tenterden, C. J., says:

> "'This was an action of trespass for false imprisonment against a magistrate, who had committed the plaintiff for re-examination for a period of *fourteen* days * * *. It appears, however, to us to be far the better opinion, that in a case like this, where the time is unreasonable, *the commitment is void from the beginning.* The duty of a magistrate is to commit for a reasonable time, and if he commits for an unreasonable time, *he thereby does an act he is not authorized by law to do.* In the case of Rex v. Gooding (a) the judges thought that a commitment for an unreasonable time would be a *void commitment.*

For it is stated in the report, that "they (the judges) presumed that it must have appeared at the trial, that the time was reasonable, as otherwise *he (the rescuer) ought to have been acquitted.*" That goes to the very point, that a commitment for re-examination, if it be for an unreasonable time, is therefore *wholly void.* For the Judges were of the opinion, that the party so committed *was not in lawful custody,* and, therefore, *that another who had aided such person in escaping from prison, was not guilty of any offense against the law.'*

"These cases demonstrate that under the British criminal law, delay in giving to accused a preliminary hearing entitled accused not only to an action for false imprisonment against the arresting officer but also to be discharged from custody, for the reason that the delay *rendered the whole proceeding void.* Note that in Rex. vs. Gooding, which Lord Tenterden refers to in the above quotation, the Court expressed the view that where an accused has been held for an unreasonably long time without preliminary examination, and another *actually helps that accused to escape from prison,* the rescuer has committed *no offense against the law.* That is putting the rule about as strongly as it can be put. Can it be doubted then, that a defendant has a right to a prompt preliminary examination, over and above the right conferred on him by constitutional guarantee of speedy trial?

"The American law on this particular phase of the argument follows the above cited English cases. American courts, too, hold that where a statute gives the accused the right to a preliminary hearing, the State must accord with that right by quick action or else see the accused freed."

In *U. S. vs. Worms,* 29 Fed. No. 16765, 4 Blanchford, 332, a Federal case, the syllabus reads as follows:

"A commitment of a prisoner by a Commissioner, on a preliminary warrant, for examination, should be for a short fixed period of time, and not for an indefinite time.

"The time should not exceed 24 hours, except for special cause shown, unless requested by prisoner.

"The government should be held to diligence in producing their testimony, *or the prisoner should be discharged.*"

The Court says in its opinion:

"The defendants were arrested in March last on a charge of smuggling, and were committed, on a preliminary warrant, for examination, for an indefinite time. They remained in prison without any steps being taken for their examination, till the case was brought before me, they having been in prison from one to two months. I directed that the examination should take place immediately, or I would discharge them from custody.

"The commitment in the first instance was erroneous, as it should have been for a short, fixed period of time. In these cases of arrest, the commitment, with a view to the hearing by the Commissioner of the testimony on behalf of the Government, should be for a time certain, and, unless, on special cause shown, *should not, except at the request of the prisoner, exceed the period of twenty-four hours;* and, in case cause is shown, on the part of the Government, for further delay, to procure testimony, great diligence should be required in its procurement, *and, in case of neglect, the Commissioner should discharge the prisoner.* It is the special duty of the officers who have charge of the prosecution, to attend to the examination *with all reasonable dispatch,* as the prisoner is usually kept in close custody during the preliminary examination, and it is wrong, if he is ready for hearing, that he should be kept in confinement

> *an hour beyond the time reasonably necessary* for a full investigation of the crime charged * * *."

The first Reporter syllabus in the case of *Ex Parte Chambers,* 32 Cal. App. 476, 163 P. 223, reads as follows:

> "1. Criminal Law. Key No. 228.—Preliminary Examination.—Time. While the statute does not prescribe the time within which the preliminary examination must be begun after information is filed before the committing magistrate, *its letter and spirit is opposed to a delay of nearly five months."*

In *Commonwealth vs. Sweetlick,* 19 Pa. Dist. 397, a Pennsylvania case, defendant was committed on a charge of aggravated assault and battery. The preliminary hearing was delayed for forty days after his arrest, this being ten days after the grand jury met, and five days after it had been discharged. The accused thereupon sued out habeas corpus and was discharged by the Court.

It seems to the writers that, beyond all question, the burden was upon the State of Nebraska to show the necessity of the delay which took place in holding the preliminary hearing and in the actual trial of this case. The State failed to do this, and as the record now stands the delay is shown to be inexcusable.

From the granting of the Magna Charta every person living under the jurisdiction of the British Sovereign and every person living under the jurisdiction of the United States of America has been by said Great Charter and by the Constitution of the United States, and by the Constitution of the State, and every State of the United States, guaranteed the right to a speedy public trial by a jury in the district in which he resides, and neither the Congress of the United States, nor any Legislature of

any State, nor any Judge nor any public official, has a right to deny him the right to the process of the State that is prosecuting him, to bring witnesses to testify on his behalf before the Court and to grant him a speedy trial, and in the absence of legitimate excuse made necessary by some unusual calamity that trial must take place at least three months from the time he was first imprisoned and charged.

When the Constitution of the United States was adopted the people of the colonies, who had declared their liberty, claimed all the privileges and rights that had been granted to them under the Magna Charta and when they adopted the Constitution of the United States and the Bill of Rights they incorporated a great many of those provisions therein for fear that at some time public officials would claim that they did not have such rights and privileges, and when the Constitution of the State of Nebraska was adopted and ever since said time, men living in Nebraska have been protected by that Great Charter and by the Constitution of the United States and the State, in having a speedy trial if they had been imprisoned and charged with an offense, and that is true even if they are admitted to bail, and in the absence of some showing by the State that some great calamity or that something made it absolutely impossible to bring the defendant to trial within three months from the time he was first arrested, his arrest is void from the beginning, and the complaint and information against him are void from the beginning and he has been unlawfully deprived of his liberty and is entitled to an immediate discharge.

Point 2.

The Information upon which the petitioner was prosecuted and convicted did not charge a crime, and the conviction of the petitioner in this case is therefore violative of that portion of Section 1 of Article XIV of the Amendments to the Constitution of the United States relating to due process of law, in the following particulars, and each of them:

(a) It did not advise him of the nature and cause of the accusation made against him.

(b) It was incoherent, indefinite and uncertain.

(c) It was so lacking in clarity that no one could intelligently enter a plea to the same, and of necessity the petitioner was forced to stand mute.

(d) It was not alleged that the doing of the things charged in Count 1 of the Information, the Count upon which a conviction was had, were "contrary to the form of the statutes of the State of Nebraska in such cases made and provided, and against the peace and dignity of the State of Nebraska." (This allegation followed Count 2 of the Information, but petitioner was acquitted on that Count and this language in same could not be transplanted legally to Count 1.)

If an Information against an accused charged with a violation of a State law does not charge a crime, in that it does not inform the accused of the nature and cause of the accusation made against him, and if the Information is incoherent, indefinite or uncertain, and if same is so lacking in clarity that the accused cannot plead to it and is obliged to stand mute, and if same is incomplete, in that it does not allege the entity of Government

it is claimed the accused has offended against, or if the Information is lacking in any of these particulars, a conviction had thereon violates that portion of Section 1 of Article XIV of the Amendments to the Constitution of the United States relating to due process of law.

The Information in this case relating to Count 1 upon which the defendant was convicted in substance charged—

> "That on or about the 25th day of February, 1942, William Maher * * * late of the County of Douglas aforesaid, in the County of Douglas and State of Nebraska, aforesaid, then and there being, did then and there wilfully and maliciously attempt to set fire to and burn, committing acts preliminary thereto and in furtherance thereof a certain building situated at 3011 St. Mary's Avenue in the City of Omaha, County of Douglas, State of Nebraska, owned by Lucille F. Lanphier, and personal property consisting of fixtures of the value of $500.00 belonging to Raymond C. Agosta and situated at and in the premises located at 3011 St. Mary's Avenue in the City of Omaha, County of Douglas, State of Nebraska." (R. pp. 5-6.)

Count 2 was submitted to the jury and the defendant was acquitted on same.

It will be noted that in Count 1 there is no allegation that the matters alleged were "contrary to the form of the statutes in such cases made and provided, and against the peace and dignity of the State of Nebraska."

A perusal and reading of the foregoing quoted language from Count 1 shows that it was not informative; that it did not advise defendant of the nature and cause of the accusation made against him as required by Section 11 of Article I of the Constitution of the State of Nebraska; that it was incoherent and a jumbled jargon of

words and suggests one of the reasons why William F. Maher was compelled to stand mute, because no person, except a man who could read the prosecutor's mind, could determine the nature of such a charge. It, instead of being a model of clarity, was the essense of confusion and was in truth and in fact the masterpiece of mental confusion. We cannot believe that the Supreme Court of Nebraska read and understood what a meaningless document this Information was, and in wonderment ask ourselves the question: Can such an Information be said to satisfy that portion of Section 1, Article XIV of the Amendments to the Constitution of the United States of America as far as due process of law is concerned? It is indeed a travesty on justice to say that such an Information carries with it legality, and can be the basis of a prosecution in our so-called enlightened day and age. The trouble with this prosecution is that because of this Information it was never a living, breathing reality, but was a dead and senseless stillborn thing.

In the opinion of the Court it is pointed out (R. p. 101) that Section 28-5,101 of the Comp. St. Supp., 1941, the language of the statute upon which this senseless Information was grounded, is as follows:

> "Any person who wilfully and maliciously attempts to set fire to or attempts to burn or to aid, counsel or procure the burning of any of the buildings or property mentioned in the foregoing sections, or who commits any act preliminary thereto, or in furtherance thereof, shall be guilty of arson in the fourth degree and upon conviction thereof be sentenced to the Penitentiary for not less than one nor more than two years or fined not to exceed One Thousand Dollars. The placing or distributing of any inflammable, explosive or combustible material or substance, or any device in any building or property mentioned in

> the foregoing sections in an arrangement or preparation with intent to eventually wilfully and maliciously set fire to or burn same, or to procure the setting fire to or burning of same shall, for the purpose of this act constitute an attempt to burn such building or property."

The Court then proceeds to discuss certain Nebraska cases dealing with the question as to whether or not the statute lacked clarity and certainty and whether or not it was violative of Section 14 of Article III of the Nebraska Constitution, which provides in part:

> "No bill shall contain more than one subject and the same shall be clearly expressed in the title,"

and arrived at the conclusion (R. pp. 101, 102) that the statute is not vulnerable to such a constitutional attack, and finds as a matter of fact that the statute does not violate the constitutional provision with reference to certainty and clarity, and also states that (R. p. 102)—

> "In a criminal statute what is lawful and what is unlawful should not be left to conjecture. The crime, and its elements, must be clearly expressed so that the ordinary person can intelligently choose, in advance, what course it is lawful for him to pursue."

And the Court further says in the opinion that (R. pp. 102-103)—

> "the words 'wilfully and maliciously' apply to those 'who commit any acts preliminary thereto or in furtherance thereof.' The words 'thereto' and 'thereof' apply to 'attempts to set fire to or attempts to burn.' When the sentence of which the defendant complains is read in relation to the entire act its meaning is certain and clear and we hold it to be constitutional."

The meaning which the Court gathers from the act is not clear and plainly expressed in the act itself. No

one will gainsay the fact that the Court is powerless to read into a statute that which the statute does not specifically state. If there is any doubt about this law it will be immediately dispelled by a casual reading of Section 29-106 of the Compiled Statutes for the year 1929, which is as follows:

> "This code and every other law upon the subject of crime which may be enacted shall be construed according to the plain import of the language in which it is written, without regard to the distinction usually made between the construction of penal laws and laws upon other subjects, and no person shall be punished for an offense which is not made penal by the plain import of the words, upon pretense that he has offended against its spirit."

Section 29-109 of the Compiled Statutes of Nebraska for the year 1929 provides:

> "Except where a word, term or phrase is specifically defined, all words used in this code are to be taken and construed in the sense in which they are understood in common language, taking into consideration the context and subject matter relative to which they are employed. * * *"

It is our thought that no Court, functioning under these provisions of the statute, can read into the law words and phrases not expressly stated in that penal law. And certainly no Court can breathe life into an incoherent Information which does not allege the offense in the language of the statute in plain, understandable words, not incoherent language or words, and which does not recite that the doing of the things alleged were "contrary to the form of the statutes in such cases made and provided and against the peace and dignity of the State of Nebraska."

In the Court's opinion in an effort to sustain the constitutionality of this law, the Court has lost sight of the fact that what the Legislature attempted to do by the use of the language, "the placing or distributing of any inflammable, explosive or combustible material or substance, or any device in any building or property mentioned in the foreging section in an arrangement or preparation with intent to eventually wilfully and maliciously set fire to or burn, or to procure the setting fire to or burning of same shall, for the purpose of this act constitute an attempt to burn such building or property," was to substitute "intent" for "attempt." In other words, intent to do a thing is one thing, and an attempt to do a thing is another, and attempt involves intent, plus the actual doing of some act which would serve the purpose of carrying out an intent, or motivating the intent.

It will be noted from a reading of the resume of the evidence set forth in the Application for this Writ, under the heading "Summary and Statement of the Case" that no evidence was produced to the effect that there was an actual burning of anything, or any preparation on the part of the petitioner to burn or attempt to burn anything, and that no acts of the petitioner were set forth in the Information specifically disclosing just what acts of his it was claimed amounted to "*committing acts preliminary thereto and in furtherance thereof.*" At best, this quoted clause which we have just put in italics was a mere conclusion of the pleader and not the statement of any fact and has no legal efficacy whatsoever.

Point 3

The petitioner was denied due process of law in violation of Section 1 of Article XIV of the Amendments to the Constitution of the United States in the following particulars, and each of them:

(a) In that he was never arraigned as provided for by the laws of the State of Nebraska.

(b) In that no plea of "not guilty" was ever entered on the Information as provided for by the laws of Nebraska.

(c) In that no legal arraignment of the petitioner was ever had.

It is our claim that if the law of a State provides that an accused charged with a felony shall be arraigned and asked to plead to an Information all of the statutory provisions in reference to same must be followed and the arraignment must be had at a time, place and manner agreeable to the statutes, and the failure to follow the statutory law of the State relating to the time, place and manner of the arraignment amounts to a denial to an accused of due process of law under the applicable portions of Section 1 of Article XIV of the Amendments to the Constitution of the United States.

A Judge not only abuses his discretion and not only commits absolute error in attempting to compel the arraignment of a defendant in chambers in a district other than the district from which the Judge was elected, but it is wholly without jurisdiction, as a Judge of one district in Nebraska has no jurisdiction or power to sit in chambers in another district than his own, to hear the arraignment of a defendant in a felony case in chambers

in a district other than the one from which he was elected.

Art. V, Sec. 9, Constitution of Nebraska.
Section 27-317, Comp. Stat. of Neb., 1929.
Section 27-318, Comp. Stat. of Neb., 1929.
Section 29-1815, Comp. Stat. of Neb., 1929.
Section 29-1818, Comp. Stat. of Neb., 1929.
Section 29-1820, Comp. Stat. of Neb., 1929.

Where the record affirmatively shows that the defendant was never arraigned as to Count 1 of an Information charging a felony, and never waived arraignment, a conviction will not be sustained even if the Court did order a plea of guilty entered when the defendant stood mute upon the advice of counsel.

Barker vs. State, 54 Neb. 53, 74 N. W. 427.
Browning vs. State, 54 Neb. 203, 74 N. W. 631.
Burroughs vs. State, 94 Neb. 519, 143 N. W. 450.
Ex Parte Resler, 115 Neb. 335, 312 N. W. 765.

It is true, as stated in the Nebraska Supreme Court opinion, that since the above cases were decided that Section 29-1815, Comp. St., 1929, was passed by the Nebraska Legislature (R. p. 105), but this statute in no way countenances the doing of the things which the Record discloses were done by the Trial Judge in chambers (R. pp. 83 and 84-85).

These acts of the Court in attempting to compel the arraignment of the defendant in chambers were not only an abuse of discretion by which the defendant was denied a fair and impartial trial, and it was not only absolute error, but it was wholly without the jurisdiction of a Judge of the District Court in another district than his

own to hear the arraignment of a defendant in a felony case in chambers, and was a direct violation of Article V, Section 9, of the Constitution of Nebraska, as amended, reading:

> "Constitution, Article V.
>
> "Sec. 9. District Courts, Jurisdiciton, Felons May Plead Guilty, Sentence. The District Courts shall have both chancery and common law jurisdiction, and such other jurisdiction as the Legislature may provide; and the judges thereof may admit persons charged with felony to a plea of guilty and pass such sentence as may be prescribed by law,"

which, by implication, denies the power to hear arraignments, by limiting the power to—

> "and the judges thereof may admit persons charged with felony to a plea of guilty and pass such sentences as may be prescribed by law,"

and no power or jurisdiction in chambers is given to a District Judge of any district to make any order whatsoever of any kind, except at chambers within his own district.

Section 27-317, Compiled Statutes of Nebraska, 1929, reads in part as follows:

> "District Judge, Jurisdiction in Chambers. A Judge of the district court may sit at chambers anywhere WITHIN HIS DISTRICT and upon ten days' notice to the adverse party or his attorney of record, shall have power to: * * *"

Nowhere under the statutes or laws of the State of Nebraska has a District Judge been given the power either by the Consittution or by any law passed by the Legislature to conduct arraignments of persons charged with a felony in chambers, or any place but in open court, and

then only while sitting as presiding Judge of a Court in session.

Section 27-317, Compiled Statutes of Nebraska, 1929,
Section 27-318, Compiled Statutes of Nebraska, 1929,

And

Section 29-1815 reads:

"Arraignment of Accused, Plea, When Considered Waived. The accused shall be arraigned by reading to him the indictment, unless the reading shall be waived by the accused, by the nature of the charge being made known to him, and he shall then be asked whether he is guilty or not guilty of the offense charged. If the accused appear in person and by counsel and goes to trial before a jury regularly impaneled and sworn he shall be deemed to have waived arraignment, and plea of not guilty deemed to have been pleaded."

And

Section 29-1818, Compiled Statutes of Nebraska, 1929, reads as follows:

"Accused stands mute, Plea of 'not guilty' entered. If the issue on the plea in bar be found against the defendant, or if upon the arraignment the accused offer no plea in bar, he shall plead 'guilty' or 'not guilty'; but if he plead evasively or stand mute, he shall be taken to have plead 'not guilty.'"

And

Section 29-1820, Compiled Statutes of Nebraska, 1929, reads as follows:

"Plea of 'not guilty,' Day of Trial Designated. If the accused plead 'not guilty,' the plea shall be entered on the indictment, and the prosecuting attorney shall, under the direction of the court, designate

> a day for trial, which shall be a day of the term at which the plea is made, unless the court, for good reasons, continue the case to a subsequent term."

Not only did Judge Landis have no jurisdiction to hear the arraignment of William Maher in chambers in Douglas County, Nebraska, but it appears affirmatively that neither the County Attorney nor the Judge nor anyone else ever complied with the following provision of Section 29-1815, Compiled Statutes of Nebraska, 1929, reading as follows:

> "Arraignment of Accused, Plea, When Considered Waived. * * * and he shall then be asked whether he is guilty or not guilty of the offense charged. * * *"

At pages 84 and 85 of the Record it appears that immediately upon Mr. Brome having finished reading both Counts of the Information to Mr. Maher, in chambers, the Judge made this statement:

> "THE COURT: Your witnesses are endorsed and filed? William Maher, what do you say to Count One?"

instead of saying, "William Maher, are you guilty or not guilty?" or "what do you say to count one, are you guilty or not guilty?" or "do you plead guilty or not guilty?" and then Maher stands mute. Of course, the Judge was interrupted by counsel making a statement, which ended as follows:

> "MR. NORTH: Mr. Maher, I will advise you as long as there have been these motions to quash and challenge to the panel you stand mute when the Judge asks whether you plead guilty. You stand mute in order that you might not be taken to waive any of the proceedings." (R. pp. 84-85.)

showing conclusively that Maher never waived arraignment, and the Judge may have intended to ask Maher whether he was guilty or not guilty, but he never did.

And then the Court, after Maher made no answer, said:

> "THE COURT: What do you say as to Count Two? Guilty or not guilty?" (R. p. 85.)

and Mr. Maher again made no answer, and then the Judge stated in chambers, although the Court Reporter referred to him as "The Court":

> "THE COURT: You stand mute under the situation and we are entering a plea of not guilty to each count." (R. p. 85.)

and as petitioner nowhere waived being arraigned as provided by law, and committed no act that would be as a waiver he has never been arraigned on Count 1, although he was arraigned on Count 2, as far as the formalities are concerned on Count 2, but the jury found him not guilty on Count 2, and neither the Judge, attempting to preside, nor any Court, had the power to sentence Maher on Count 1, he never having been arraigned.

Where the record affirmatively shows that the defendant was never arraigned as to Count 1 of an Information charging a felony, and never waived arraignment, a conviction will not be sustained even if the Court did order a plea of not guilty entered when the defendant stood mute upon advice of counsel.

Barker vs. State, 54 Neb. 53, 74 N. W. 427, Syllabus 4 reading as follows:

"A conviction under an amended information charging a felony will not be sustained where the record does not affirmatively disclose that the accused was arraigned, and that he pleaded before trial."

And in the body of the opinion, Judge Norval states, upon page 428 of 74 North Western Reporter:

"It is obvious that in every case where a trial upon an indictment or information is required, a plea of not guilty must be entered by the court, since this is essential to the formation of the issue upon which the accused is tried. Without such plea being entered of record, there was nothing for the jury to pass upon. A conviction of a felony cannot be sustained where the record fails to show that the accused was arraigned, and that he pleaded to the accusation before trial."

Browning vs. State, 54 Neb. 203, 74 N. W. 631, Syllabus 1 by the Court reading:

"A judgment of conviction of felony cannot stand where there was no arraignment of, and plea by, the accused before the trial."

Burroughs vs. State, 94 Neb. 519, 143 N. W. 450, Syllabus 1 reading:

"Under Section 448 of the Criminal Code, a conviction of a felony will not be sustained where the defendant enters his objection after the verdict unless the record affirmatively discloses that the accused was arraigned and that he pleaded to the information or indictment before the trial."

Ex Parte Resler, 115 Neb. 335, 212 N. W. 765.

Opinion by Justice Eberly, and where on page 766 of 212 North Western Reporter, the Court says:

"It is firmly established that if a court or a judge thereof which renders a judgment, or who enters

an order, has not jurisdiction to perform the act done, either because the proceeding or the law under which it is taken is unconstitutional, or for any other reason the judgment is void, it may be questioned collaterally, and a defendant who is imprisoned under and by virtue of it may be discharged."

In this connection, it will further be noted that although the defendant, William Maher, was not arraigned on said Information as to Count 1 and was not asked if he pleaded guilty or not guilty to each of said Counts as hereinafter set forth in Instruction No. 3 (R. p. 14), nevertheless and notwithstanding the Court gave said Instruction No. 3 on its own motion, reading in part as follows (R. p. 14):

> "The defendant, William Maher, was arraigned on said Information as to Count I and Count II, and stood mute when he was asked if he plead guilty or not guilty to each said counts. Whereupon, as the law requires, the said defendant, William Maher, shall be taken to have plead 'not guilty' as to Count I, and 'not guilty' as to Count II of said Information, and the court entered a plea of not guilty as to each of said counts, Counts I and II. * * *"

As the Judge did not ask the plaintiff in error if he plead guilty or not guilty to each of said Counts as set forth in Instruction No. 3, but only asked as to Count 2, the instruction is incorrect and prejudicial to petitioner, and especially was it prejudicial to the petitioner to state that defendant, William Maher, stood mute when he was asked if he plead guilty or not guilty to each of said Counts, the same conveying to the jury the idea that he stood mute because he didn't know whether he was guilty or not guilty, but the real reason being that he had been instructed by his counsel so to do (R. p. 84). Counsel said to his client:

"You stand mute in order that you might not be taken to waive any of the proceedings."

If it is claimed that the petitioner waived arraignment, then the writer would like to inquire as to how many objections and exceptions it is necessary to make in order to protect the record, as he believes that the foregoing advice by counsel, in the presence of the Judge, was all that was necessary to save each and all of his exceptions.

Point 4

The petitioner was prevented from having a fair and impartial trial under the law in violation of Section 1 of Artice XIV of the Amendments to the Constitution of the United States relating to due process of law in the following particulars, and each of them:

(a) In that no trial was accorded him in the District Court of Douglas County, Nebraska, until seven of his important witnesses were absent from the jurisdiction of the Court and in the Armed Forces of the United States and his most important witness, Raymond A. Agosta, had died, and another important witness by the name of Joe Sullivan had died.

(b) In that petitioner was wrongfully denied a continuance because of the absence from the jurisdiction of his said witnesses.

(c) In that when the case was finally called for trial, Grenville P. North, the only counsel for the petitioner, was serious ill and his motion for a continuance on that ground and also the absence of his witnesses was wrongfully denied and he was compelled to proceed to try the case himself or to surrender the defense of his client to some newly acquired counsel who was not familiar with

the facts in the case and who would not have had any time prior to the commencement of the actual trial to acquaint and familiarize himself with the case and formulate a plan of trial.

We urge that the failure of the prosecuting authorities of a State to call up promptly a criminal case for trial and to delay a trial until a number of the defendant's witnesses have been called into the Armed Forces of the United States and have left the jurisdiction of the Court and are not available for the defendant, and other important witnesses for the defense have died and then refuse the defendant a continuance because of said facts and for the further reason that counsel for the accused was ill and under a doctor's care, amounts to a denial to such defendant of due process of law as guaranteed to him under that portion of Section 1 of Article XIV of the Amendments to the Constitution of the United States.

Likewise, if counsel for an accused is ill and is compelled by a State Court to either proceed with the defense of the case of the accused or face the alternative of surrendering the defense to newly acquired counsel who is unfamiliar with the case, and who will not be given a reasonable length of time to familiarize himself with the facts, and the pursual of such a course of judicial conduct results in a conviction, it will be presumed, as a matter of law, that the defendant was prejudiced, and such a conviction would be in violation of that part of Section 1 of Article XIV of the Amendments to the Constitution of the United States relating to due process of law.

It is the duty of the Court to be fair and impartial and to protect the interests and rights of the defendant, as well as the rights of the State.

Bourne vs. State, 116 Neb. 141, 216 N. W. 173. Syllabus 3 by the Court reading:

> "Further, it is the duty of the court, as well as of the attorneys, to endeavor to surround the trial with an atmosphere of fairness, undisturbed by prejudice, passion or ill will."

It was error and an abuse of discretion on the part of the Trial Court not to grant a continuance to the defendant where it appears that the person whose property he was alleged to have attempted to burn and whose testimony was material to the defendant, died about one hour before the commencement of the trial.

And it was further error and abuse of discretion for the Court to refuse to grant a continuance where the case had been continued by the State for about thirteen months over the objection of the defendant, and then to force the case to trial when six or seven of the witnesses for the defendant, whose testimony was material to defendant, had been mustered into the Armed Forces of the United States and taken beyond the process of the Court to bring them in as witnesses on behalf of defendant, and especially so when it appeared that depositions could be taken of some of the witnesses.

Miller vs. State, 29 Neb. 437, 45 N. W. 451. Syllabus 3, by the Court, reading:

> "Where a motion for a continuance of a criminal case made by the accused, on account of the absence of a witness, is supported by affidavits stating what the witness would testify to if present, and it appearing that such testimony is material, that reasonable diligence has been used to procure the same, and that there is a probability of obtaining such

testimony by the next term of court, held, the continuance should be granted."

It will be noted that both counsel for petitioner in his testimony in support of the continuance, and the petitioner while testifying, showed the necessity of having the evidence of the witnesses, Lawrence Scavio, Mike Scavio, Harry Ostrum, William Joseph, Emmet Gardner, Harry Kane, Rudolph Bruhn and Raymond Agosta, and it will be further noted that if a continuance of a very few weeks had been granted, Lawrence Scavio would have returned to the jurisdiction of the Court and would have been available as a witness (R. pp. 55 to 65, incl., and R. pp. 73 to 81, incl.).

It is an abuse of discretion and reversible error for the Court to deny a continuance where it appears several continuances have been granted to the State over the objection of the defendant, and then, when the case is finally set for trial, the defendant's attorney is ill and unable to properly proceed and try said case.

Horr vs. Easton, et al., 114 Neb. 829, 211 N. W. 172, Syllabus 1, by the Court, reading:

> "Where a defendant alleges a valid and lawful defense in a suit brought against him and before the time set for the trial he becomes ill and is unable to attend court upon the time fixed therefor, and such fact is established by his own affidavit and that of his counsel and his physician, ordinarily it is error for the trial court to proceed to trial in the absence of such defendant."

Cornell vs. State, 138 Neb. 708, 294 N. W. 851. Syllabus 3, by the Court, reading:

> "A criminal case will not be reversed for the refusal of the trial court to grant a continuance, unless this court is convinced from the record that the defendant was prejudiced thereby."

A certificate of Dr. Frank Lovely certifying as to the illness of counsel for plaintiff in error will be found in the printed record at page 85.

The failure to give an accused from the very inception of the prosecution a speedy trial in a case involving the violation of a State law, is a violation of that portion of Section 1 of Article XIV of the Amendments to the United States Constitution which relates to due process of law.

The case of *Isaih Chambers, et al., vs. State of Florida,* 84 L. Edition 716, 309 U. S. 227, decided February 12, 1940, was a case which came before the Supreme Court of the United States on writ of certiorari to the Supreme Court of Florida to review judgment affirming convictions in the Palm Beach County Circuit Court on the crime of murder. Mr. Justice Black delivered the opinion of the Court, and beginning with page 721 of 84 L. Edition stated as follows:

> "Third. The scope and operation of the Fourteenth Amendment have been fruitful sources of controversy in our constitutional history. However, in view of its historical setting and the wrongs which called it into being, the due process provision of the Fourteenth Amendment—just as that in the Fifth—has led few to doubt that it was intended to guarantee procedural standards adequate and appropriate, then and thereafter, to protect, at all times, people charged with or suspected of crime by those holding positions of power and authority. Tyrannical governments had immemorially utilized dictatorial crim-

inal procedure and punishment to make scapegoats of the weak, or of helpless political, religious, or racial minorities and those who differed, who would not conform and who resisted tyranny. The instruments of such governments were, in the main, two. Conduct, innocent when engaged in, was subsequently made by fiat criminally punishable without legislation. And a liberty loving people won the principle that criminal punishments could not be inflicted save for that which proper legislative action had already by 'the law of the land' forbidden when done. But even more was needed. From the popular hatred and abhorrence of illegal confinement, torture and extortion of confessions of violations of the 'law of the land' evolved the fundamental idea that no man's life, liberty, or property be forfeited as criminal punishment for violation of that law until there had been a charge fairly made and fairly tried in a public tribunal free of prejudice, passion, excitement and tyrannical power. Thus, as assurance against ancient evils, our country, in order to preserve 'the blessings of liberty,' wrote into its basic law the requirement, among others, that the forfeiture of the lives, liberties or property of people accused of crime can only follow if procedural safeguards of due process have been obeyed. * * *

"This requirement—of conforming to fundamental standards of procedure in criminal trials—was made operative against the States by the Fourteenth Amendment. * * *"

And Justice Black further states on page 724 of 84 L. Edition:

"We are not impressed by the argument that law enforcement methods such as those under review are necessary to uphold our laws. The Constitution proscribes such lawless means irrespective of the end. And this argument flouts the basic principle that all people must stand on an equality before the bar of justice in every American court. Today, as in ages past, we are not without tragic

proof that the exalted power of some governments to punish manufactured crime dictatorially is the handmaid of tyranny. Under our constitutional system, courts stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are nonconforming victims of prejudice and public excitement. Due process of law, preserved for all by our Constitution, commands that no such practice as that disclosed by this record shall send any accused to his death. No higher duty, no more solemn responsibility, rests upon this Court, than that of translating into living law and maintaining this constitutional shield deliberately planned and inscribed for the benefit of every human being subject to our Constitution—of whatever race, creed or persuasion.

"The Supreme Court of Florida was in error and its judgment is reversed."

The case of *Albert Smith vs. Joseph O'Grady*, 312 U. S. 329-334, 61 Sup. Ct. 572, 85 L. ed. 859, came before the Supreme Court of the United States on certiorari to the Supreme Court of the State of Nebraska, and in that case Mr. Justice Black, delivering the opinion of the Court, stated (p. 862 of 85 L. ed.):

"Because of his ignorance of his rights, and because of the trial court's failure to appoint, and his inability to obtain counsel, the original sentence was not appealed.

"These allegations, if true, undermine and invalidate the judgment upon which petitioner's imprisonment rests. The circumstances under which petitioner asserts he was entrapped and imprisoned in the penitentiary are wholly irreconcilable with the constitutional safeguards of due process. For his petition presents a picture of a defendant, without counsel, bewildered by court processes strange and

unfamiliar to him, and inveigled by false statements of state law enforcement officers into entering a plea of guilty. The petitioner charged that he had been denied any real notice of the true nature of the charge against him, the first and most universally recognized requirement of due process; that because of deception by the state's representatives he had pleaded guilty to a charge punishable by twenty years to life imprisonment; that his request for the benefit and advice of counsel had been denied by the court; and that he had been rushed to the penitentiary where his ignorance, confinement and poverty had precluded the possibility of his securing counsel in order to challenge the procedure by regular processes of appeal. If these things happened, petitioner is imprisoned under a judgment invalid because obtained in violation of procedural guaranties protected against state invasion through the Fourteenth Amendment. The state court erroneously decided that the petition stated no cause of action. If petitioner can prove his allegations the judgment upon which his imprisonment rests was rendered in violation of due process and cannot stand. Reversed and remanded."

It seems to us that under the record in this case Maher was rushed through and tried without any proper legal counsel and after having denied him any but a sick lawyer, and was prevented from having a fair and impartial trial and due process of law just as effectively as was defendant, Albert Smith, referred to in the foregoing quotation.

Point 5

The statute upon which this prosecution and conviction was had, namely, Section 28-5,101, Comp. St. Supp., 1941, is unconstitutional and null and void and in violation of Section 1 of Article XIV of the Amendments to the Constitution of the United States, in that the petitioner could not be accorded under that statute due process of law, in the following particulars, and each of them:

(a) Because no norm or ascertainable standard of guilt is set up in said law.

(b) Because the ultimate operative fact presumed by said statute has no rational connection to the fact to be proved, and the statute provides for the inference of one fact from proof of another fact, which is so unreasonable as to be a purely arbitrary mandate.

(c) The presumption created has no relation in experience to general facts.

(d) Because the statute attempts to declare an individual guilty, or presumptively guilty of a crime, and that is not within the province of the Legislature and conflicts with and tends to nullify the presumption of innocence.

(e) In that the said statute attempts to and does declare that to be a fact which is not a fact, and that to be true which is not true.

Section 25-5,101, 1941 Supplement, Compiled Statutes of Nebraska for 1929, provides that:

> " 'The placing or distributing of any inflammable, explosive or combustible material or substance, or any devise in any building or property mentioned

'in an arrangement or pre-operation with intent to eventually, wilfuly and maliciously set fire to or burn same, or to procure the setting fire to or burning of the same shall, for the purpose of this act, constitute an attempt to burn such building or property.' "

This required the jury to find William Maher guilty of arson in the fourth degree after he had testified that he purchased and delivered the two tin cans, whether he knew or not that gasoline was to be procured, if it was to be procured, in these cans and used for the purpose of attempting to set fire to the property, because the act of bringing the cans was an act "preliminary thereto" and the act of delivery of the cans was another act "preliminary thereto," and in no place was it provided that he must know that the acts were preliminary to an attempt to burn in order to render him guilty. Neither was it provided that the preliminary acts must have been done wilfuly and maliciously, but only these bare words—

"Or who commits any act preliminary thereto, or in furtherance thereof, shall be guilty of arson in the fourth degree."

Following out the exact meaning of the statute—if the most law-abiding person had been requested by Raymond Agosta, or some other person, to buy two five-gallon tin cans and deliver them to the restaurant of Raymond Agosta—and had done so and the same complaint was filed against him as was filed against William Maher in this case—it would have been the duty of the jury to convict him of fourth degree arson, if this statute is not void.

But to go on a little further: If one had helped to refine the gasoline that was found in the premises, by the same provision of the statute he would be guilty; or if he had taken his automobile and transported the cans to

the restaurant, if the statute is not void, he would be equally guilty; or if he had organized a corporation to drill for oil that was later discovered and refined into the gasoline that was found on the premises, he would be equally guilty. So, also, if he had given any matches to anyone who had intended to set fire to the premises, even if he had no knowledge that they intended to set fire to the premises, he would have been equally guilty; also he would be equally guilty, if the statute is not void, if he had cut down the trees in the forest that were later made up into the match sticks; and so also would have been guilty, if the statute is not void, if he had built the building that it was claimed was attempted to be burned; so also would he be equally guilty if he had taken any of the personal property into the premises that it was claimed was over the value of $25.00 and was attempted to be burned, and all this even if he had no knowledge whatsoever that anyone intended to burn the building or property and although he himself had no wilful or malicious intent to burn the building.

In other words, the statute as it is drawn containing these words:

> "* * * *Or who commits any act preliminary thereto, or in furtherance thereof, shall be guilty of arson in the fourth degree,*"

makes any person who may have committed any of these acts guilty of arson in the fourth degree as they are all preliminary acts.

The statute as drawn provides three separate sets of acts, any of which constitute arson in the fourth degree:

First: Any person who wilfully and maliciously attempts to set fire to or attempts to burn any building or property or personal property;

Second: Any person who aids, counsels or procures the burning of any building or personal property; and

Third: Any person who commits any act preliminary thereto or in furtherance thereof.

The statute then provides that:

> "The placing or distributing of any inflammable, explosive or combustible material or substance, or any device in any building or property mentioned in the foregoing sections in an arrangement or preparation with intent to eventually wilfully and maliciously set fire to or burn same, or to procure the setting fire to or burning of same shall, for the purpose of this act, constitute an attempt to burn such building or property."

To correctly visualize the fallacy of claiming that this statute is not unconstitutional and violative of that portion of Section 1 of Article XIV of the Amendments to the Constitution of the United States relating to due process of law, if one in reading the statute considered a like law relating to attempted murder it would appear more clear that this statute is a nullity.

Supposing a law read like this:

Arming one's self with a revolver or other dangerous weapon in an arrangement or preparation with intent to kill another shall for the purpose of this act constitute an attempt to murder.

Would anyone say that that kind of a law would be legally sufficient or would common reason impel one to say that such a law arbitrarily and erroneously attempted to punish an intent as if it was an attempt? Can the leg-

islature of a state declare a thing to be that which it is not, and can a court, with reason, declare such a statute good when it defies common reason and understanding and obliges the Court, in order to sustain it, to say that which is not a fact is a fact, and that which is not true is true?

In other words, the statute "in effect spreads an all-inclusive net for the feet of everybody upon the chance that, while the innocent will surely be entangled in its meshes, some wrongdoers also may be caught."

This is not permissible to any Legislature or even to Congress.

Tyson & Bro. United Theatre Ticket Offices, Inc., vs. Banton, Dist. Attorney of New York, et al., 273 U. S. 418, 47 Sup. Ct. Rep. 426, 71 L. Ed. 893, wherein the Court, Mr. Justice Sutherland, uses the following words in approving the case of *Commonwealth vs. O'Brien and others,* 12 Cush. (Mass.) 84, 90, says (p. 432 of 47 Sup. Ct. Rep.):

> "One vice of the contention is that the statute itself ignores the righteous distinction between guilt and innocence, since it applies wholly irrespective of the existence of fraud, collusion, or extortion if that word can have any legal significance as applied to transactions of the kind here dealt with, Commonwealth v. O'Brien and others, 12 Cush. (Mass.) 84, 90), and fixes the resale price as well where the evils are absent as where they are present. *It is not permissible to enact a law which, in effect, spreads an all-inclusive net for the feet of everybody upon the chance that, while the innocent will surely be entangled in its meshes, some wrongdoers also may be caught."*

The Supreme Court of the United States in the case of *Fairmont Creamery Co. vs. State of Minnesota,* 274 U. S. 1, 47 Sup. Ct. Rep. 506, quotes with approval the Tyson case, supra, and Mr. Justice McReynolds, writing the opinion of the Court stated at page 508 of 47 Supreme Court Reporter, as follows:

> "Concerning the price-fixing statute, Tyson & Bro. v. Blanton, et al, 273 U. S. 418, 47 S. Ct. 426, 71 L. Ed. 893 (Feb. 28, 1927), recently declared:
>
> *" 'It is not permissible to enact a law which, in effect, spreads an all-inclusive net for the feet of everybody, upon the chance that, while the innocent will surely be entangled in its meshes, some wrongdoers also may be caught.' "*

and holding the Minnesota Statute unconstitutional and

> "an unwarranted interference with freedom of contract guaranteed by Amendment Fourteen *and without substantial relation to the anticipated evil."*

The writer quotes from the above two cases in the Supreme Court of the United States only for the purpose of showing that previously our own state has rightly declared to the same effect.

As will be seen in *State ex rel. English vs. Ruback,* 135 Neb. 335, 281 N. W. 607, wherein Justice Eberly uses these words, beginning on page 609 of 281 Northwestern Reporter:

> "* * * Does the language of section 3 of the unfair practices act possess the requisite definiteness to properly define a legal offense? It contains no definition of criminal intent, or of evil or criminal purpose, or of guilty knowledge. It is to be remembered that innocence must always be presumed. Under the terms of such section 3, criminality must be determined and punishment inflicted wholly without reference to the

intent, purpose or actual knowledge of the seller, solely because, as a result of what is done, such act 'may lessen, injure, destroy, prevent, hinder or suppress the competition of competitors.'

"In Fairmont Creamery Co. v. Minnesota, 274 U. S. 1, 47 S. Ct. 506, 508, 71 L. Ed. 893, 52 A. L. R. 163, it was stated:

" 'It is not permissible to enact a law which, in effect, spreads an all-inclusive net for the feet of everybody, upon the chance that, while the innocent will surely be entangled in its meshes, some wrongdoers also may be caught.'

"Likewise, in Connally v. General Construction Co., 269 U. S. 385, 46 S. Ct. 126, 70 L. Ed. 322, we find the following language (page 128): *'The dividing line between what is lawful and unlawful cannot be left to conjecture. The citizens cannot be held to answer charges based upon penal statutes whose mandates are so uncertain that they will reasonably admit of different constructions. A criminal statute cannot rest upon an uncertain foundation. The crime, and the elements constituting it, must be so clearly expressed that the ordinary person can intelligently choose, in advance, what course it is lawful for him to pursue. Penal Statutes prohibiting the doing of certain things, and providing a punishment for their violation, should not admit of such a double meaning that the citizen may act upon the one conception of its requirements and the courts upon the other."*

And further, on page 610 of 281 Northwestern Reporter, Justice Eberly quoted with approval 39 C. J. 1394, as follows:

"In creating an offense which was not a crime at common law, a statute must of course be sufficiently certain to show what the legislature intended to prohibit and punish, otherwise it will be void for uncertainty."

And Justice Eberly further says (page 610):

"The test to determine whether a statute defining an offense is void for uncertainty (1) *is whether the language may apply not only to a particular act about which there can be little or no difference of opinion, but equally to other acts about which there may be radical differences, thereby devolving on the court the exercise of arbitrary power of discriminating between the several classes of acts. Czarra v. Board of Medical Supervisors,* 25 App. D. C. 443. (2) *The dividing line between what is lawful and what is unlawful cannot be left to conjecture. United States v. Capital Traction Co.,* 34 App. D. C. 592, 19 Ann. Cas. 68; *United States v. Washington R. & E. Co.,* 34 App. D. C. 599." 16 C. J. 68, note 10.

"See also, Ex Parte Jackson, 45 Ark. 158, Stoutenburgh v. Frazier, 16 App. D. C. 229, 48 L. R. A. 220; State v. Gaster, 45 La. Ann. 636, 12 So. 739; Augustine v. State, 41 Tex. Cr. R. 59, 52 S. W. 77, 96 Am. St. Rep. 765.

"It is obvious that the terms of the statute under consideration are indefinite and uncertain. The elements of the crime it attempts to define and punish are not so clearly expressed that the ordinary person is apprised in advance as to what course it is lawful for him to pursue, and the intent and purpose of the sovereign is not clearly declared. Under these circumstances, and it being a rule of this court that a statute will not be declared unconstitutional unless necessary to the proper disposition of the pending case, (*Howarth v. Becker,* 131 Neb. 233, 267 N. W. 444), the *constitutional questions will not be discussed or determined.*

"It follows that the portion of the statute quoted, even when taken in connection with the context, is void and of no effect, and is insufficient to sustain a prosecution thereunder or civil proceedings thereon. Thus, in overruling appellant's motion to dismiss the action, the trial court committed reversible error.

> *"The judgment of the district court is, therefore, reversed and the proceeding dismissed. Reversed and dismissed."*

So, also, it seems to the writer that the following provision,

> "The placing or distributing of any inflammable, explosive or combustible material or substance, or any device in any building or property mentioned, in an arrangement or preparation with intent to eventually wilfully and maliciously set fire to or burning of the same shall, for the purpose of this act, constitute an attempt to burn such building or property."

is also void for uncertainty, for it seems to the writer that under that provision, if any good citizen left some newspapers containing pictures and reading matter with another and that person took them to the restaurant involved in this case and threw them on the floor near the door to the basement intending to tell the proprietor or one of the waiters to burn the same, such acts would constitute an attempt to burn such building or property under the above provision, and make that person guilty of arson in the fourth degree.

Any penal statute of a State which does not provide for a norm or ascertainable standard of guilt, or where the ultimate operative fact presumed by said statute has no rational connection with the fact to be proved, and provides for the inference of one fact from proof of another fact, which is so unreasonable as to be a purely arbitrary mandate, or if the presumption created has no relation in experience to general facts, or attempts to declare one guilty or presumptively guilty of a crime, or which tends to nullify the presumption of innocence, or which declares that to be a fact which ordinarily is not a fact, or declares that to be true which ordinarily is not

true, is unconstitutional, null and void and is in violation of Section 1 of Article XIV of the Amendments to the Constitution of the United States.

International Harvester Co. vs. Kentucky, 234 U. S. 216, 34 Sup. Ct. 853, 59 L. ed. 1284.

Collins vs. Kentucky, 234 U. S. 634, 34 Sup. Ct. 924, 58 L. ed. 1510.

American Seeding Machine Co. vs. Kentucky, 236 U. S. 660, 35 Sup. Ct. 456, 59 L. ed. 773.

McFarland vs. American Sugar Ref. Co., 241 U. S. 79, 56 Sup. Ct. 498, 60 L. ed. 899.

Herndon vs. Lowry, 301 U. S. 242, 57 Sup. Ct. 732, 81 L. ed. 1066.

Tot vs. U. S., 319 U. S. 463, 63 Sup. Ct. 1241, 87 L. ed. 1519.

U. S. vs. Delia, 319 U. S. 463, 63 Sup. Ct. 664, 87 L. ed. 1519.

Minski vs. U. S., 131 F. (2d) 614, affirmed with *U. S. vs. Delia,* supra.

Griffin vs. State, 142 Ga. 636, 83 S. E. 540, Ann. Cas. 1916C, L. R. A. 1915C 716.

A presumption and inference may be drawn only from facts established and a presumption may not legally rest on a presumption or an inference on an inference.

Lebs vs. Mutual Benefit Health & Accident Association, 124 Neb. 491, 247 N. W. 19.

We now wish to refer to the case of *American Seeding & Refining Co. vs. Kentucky,* 236 U. S. 660, 35 Sup. Ct. 456, 59 U. S. (L. ed.) 773, where in the opinion of the Court, Mr. Justice McKenna stated as follows:

> "The sections of the laws of Kentucky referred to were declared to be invalid by this court under

> the 14th Amendment because they, as construed by the court of appeals of the state, offered no standard of conduct that it is possible to know. Int. Harvester Co. v. Kentucky, 234 U. S. 216, 58 L. Ed. 1284, 34 Sup. Ct. Rep. 853. Therefore the judgment of conviction against plantiff in error must be reversed."

We also wish to cite the case of *International Harvester Company v. Kentucky,* 234 U. S. 216, 34 Sup. Ct. 853, 58 L. Ed. 1284, where in the opinion Mr. Justice Holmes stated as follows, on page 1287 of 59 L. Ed.:

> "The plaintiff in error contends that the law as construed offers no standard of conduct that it is possible to know."

After setting out and discussing the law, the opinion states:

> "In our opinion it cannot stand."

In *Collins vs. Kentucky* (1914), 234 U. S. 634, 34 S. Ct. 924, 58 U. S. (L. ed.) 1510, Mr. Justice Hughes delivered the opinion of the Court, and referring to the same Kentucky statutes said on page 1512 of 58 L. Edition:

> "The obejction that the statute, by reason of its uncertainty was fundamentally defective, was as available to Collins as it was to the Harvester Company."

and reversed the conviction as being violative of the due process clause of the Fourteenth Amendment.

We cite the following case for the purpose of showing that the instant case involved a Federal question which this Court may take cognizance of.

In *Herndon vs. Lowry,* 301 U. S. 242, 57 Sup. Ct. 732, 81 L. Ed. 1066. Opinion by Mr. Justice Roberts, on page 1078 of 81 L. Edition, it is stated:

"Under the statute as construed and applied, it is essential that the accused intended to induce combined forcible resistance. The presence of the intent aggravates the inducement and bring it more certainly within the power of the state to denounce it as a crime than otherwise it would be. The Supreme Court of the state in both of its opinions was dealing with a statute and a charge in which the intent of the accused was an element of the offense. In the original opinion the court incautiously said, 'it would be sufficient that he intended it (the combined and forcible resistance) to happen at any time.' In its opinion on rehearing it said the phrase 'at any time' had not been intended to mean any time in the indefinite future; and by way of avoiding such a meaning the court changed that part of the original opinion by making it read, 'at any time his influence to continue to be directly operative in causing such action by those whom he sought to induce.' I do not perceive that this puts the standard of guilt at large or renders it inadmissibly vague. The accused must intend that combined forcible resistance shall proximately result from his act of inducement. There is no uncertainty in that. The intended point of time must be within the period during which he 'might reasonably expect' his inducement to remain directly operative in causing the combined forcible resistance. The words 'might reasonably expect' have as much precision as is admissible in such a matter, are not difficult to understand, and conform to decisions heretofore given by this Court in respect of related questions. I therefore am of opinion that there is no objectionable uncertainty about the standard of guilt and that the statute does not in that regard infringe the constitutional guaranty of due process of law. Believing that the statute under which the conviction was had is not subject to the objections leveled at it, I think the judgment of the Supreme Court of the state denying the petition for habeas corpus should be affirmed."

In *Griffin vs. State* (1914), 142 Ga. 636, 83 S. E. 540, Ann. Cas. 1916C, L. R. A. 1915C 716, it is said:

> "To the validity of a legislative presumption there must be some rational connection between the fact proved and the ultimate fact presumed, and the inference of one fact from proof of another fact cannot be so unreasonable as to be a purely arbitrary mandate."

In *McFarland vs. American Sugar Refining Company*, 241 U. S. 79, 36 S. Ct. 498, 60 U. S. L. ed. 890, the Court says:

> "The presumption created here has no relation in experience to general acts. It has no foundation except with tacit reference to the plaintiff. But it is not within the province of a legislature to declare an individual guilty or presumptively guilty of a crime. * * *"

In *Tot vs. U. S.* (Mich. & N. J., 1943), 63 S. Ct. 1241, 87 L. Ed. 1519, reversing 131 F. (2nd) 261, affirming 42 F. Supp. 242, certiorari granted, 1943, 63 S. Ct. 441, 317 U. S. 623, 87 L. Ed. 1066, affirming *Minski vs. U. S.*, 131 F. (2nd) 614, certiorari granted. This case is decided along with the case of *U. S. vs. Delia*, 1943, 63 S. Ct. 664, 87 L. Ed. 1519. It holds that:

> "A rational connection between the facts proved and the fact presumed, and the comparative convenience of producing evidence of the ultimate fact, are not independent tests of the validity of a presumption created by statute, but the first is controlling and the second only a corollary.
>
> "A stautory presumption cannot be sustained if there is no rational connection between the facts proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbi-

trary because of lack of connection between the two in common experience.

"The rule that a statutory presumption cannot be sustained if there is no rational connection between the fact proved and the ultimate fact presumed does not prevent the creation of a valid presumption upon a view of relation broader than that a jury might take in a specific case, but, where the inference is so strained as to have a reasonable relation to the circumstances of life, it is not competent for the legislature to create the inference as a rule governing the procedure of courts."

In *James vs. Bowman*, 190 U. S. 127, 24 Sup. Ct. Rep. 678, it is stated:

A criminal statute should define clearly the offense which it purports to punish, and when so defined it should be within the limits of the power of the legislative body enacting it.

In *In Re Siebold*, 100 U. S. 371, *Ex Parte, Royall*, 117 U. S. 241, 6 Sup. Ct. Rep. 734, it is held:

An unconstitutional law is void, and is not law. A conviction under it is not merely erroneous, but is illegal and void.

United States vs. Quincy, 6 Pet. 445, is authority for the statement:

"To attempt to do an act does not, either in law or in common parlance, imply a completion of the act, or any definite progress towards it. An effort to endeavor to effect it will satisfy the term of law."

In *Swift & Co. vs. United States*, 196 U. S. 375, 25 Sup. Ct. Rep. 276, it is said:

Not every act that may be done with intent to produce an unlawful result is unlawful or constitutes

an attempt, but it is a question of proximity and degree, the distinction between mere preparation and attempt being well known in the criminal law.

Where acts are not sufficient in themselves to produce a result which the law seeks to prevent, but require further acts in addition to the mere forces of nature to bring that result to pass, an intent to bring it to pass is necessary in order to produce a dangerous probability that it will happen, but when that intent and the consequent dangerous probability exist the law directs itself against that dangerous probability as well as against the completed result.

Point 6

The evidence adduced by the State, as well as the evidence upon the whole trial, was insufficient in law to sustain a conviction, and the petitioner was denied due process of law, under Section 1 of Article XIV of the Amendments to the Constitution of the United States, when the case was not dismissed pursuant to appropriate Motions made to the Trial Court, or reversed and dismissed by the Nebraska Supreme Court.

The Court in its opinion (R. pp. 110 to 113, incl.) sets forth a correct resume of the evidence in the case. The petitioner gave his version of the matter also (R. pp. 55 to 65, incl.). It will be observed from a reading of same that the State was forced to rely on circumstantial evidence entirely in order to prove that the petitioner committed the offense charged. Petitioner's conduct was as consistent with innocence as it was with guilt and his case should not have been submitted to the jury by the Trial Court.

Matters Contained in the Court's Opinion Which Counsel Contend Are Wrong

(a) The Court in its opinion, in discussing the fact that due to the delay of the State in trying this case, seven of the defendant's witnesses were in the Armed Forces of the United States and two were dead, disposed of this matter primarily by saying that they "were friends and associates of the defendant" and that their testimony was "only corroborative" of the defendant's evidence. The record does not bear out this statement, but these statements of the Court, even if true, do not make their testimony valueless or immaterial. In any event, a jury had the sole weight, which in the opinions of the jurors, same deserved. No Court had the right to invade the province of the jury in that regard. It was proper and competent evidence and its weight was for the jury and not for any Court.

Every defense is strengthened by the testimony of honest witnesses, even though they be "friends and associates" of an accused, and even though they "only corroborate" the defendant, and that very corroboration might well be the means of convincing a jury of a defendant's innocence.

When one realizes and bears in mind that the Trial Court instructed the jury, as every jury is instructed (Instructions 12 and 13, R. p. 19), that they were the sole judges of the credibility of the witnesses and of the weight to be given their testimony, and that they could consider the interest, bias and prejudice of any witness, and that this rule applied equally to the defendant and that the jury could consider the *interest of the defendant* in the outcome of the case (Instruction 10,

R. p. 18) in weighing his testimony, it is readily to be seen that the corroboration of the defendant by the testimony of other witnesses would play a very important part in a jury's verdict in the case. The claimed testimony of these witnesses cannot be cast aside as "an airy nothing." A reading of the record relating to the testimony of these absent and dead witnesses, set out in this brief, we feel sure, unmistakably discloses that this evidence was vitally material and that the Trial Court, in refusing the requested continuance or in refusing to dismiss the case, was guilty of a gross abuse of *judicial discretion*, and the conviction in this case should not be permitted to stand.

What the Court has done, in our opinion, is to confuse the rule of law which relates to *newly discovered evidence* with the rule of law prevailing in cases where the Court is required to pass upon the matter of a continuance or a dismissal, because of the absence or death of and inability to procure the testimony of witnesses, whose absence or death was without fault or occasion on the part of the persons or counsel seeking the continuance.

(b) As already pointed out by us in this brief, it is our claim that this Information, as well as the law upon which it is grounded, is a nullity, because of the lack of clarity and uncertainty and the various other reasons argued at that portion of the brief.

(c) In Point 3 of our brief we argue that there was no arraignment of record because it was not endorsed on the Information and not waiver by the defendant, of the lack of arraignment, because the defendant did not plead to the Information, but stood mute and counsel made his record, stating that nothing was waived (R. p. 84).

(d) That the nullity of the original complaint in Police Court was not waived.

(e) Because there was an abuse of judicial discretion by the Trial Court, and approved of by the Nebraska Supreme Court, in the rulings relating to—

1. The holding that a speedy trial was had.

2. The holding that a fair and impartial trial was had.

3. The holding that the Motion for a continuance was correctly overruled.

(f) The last proposition which we disagree with is that contained in the opinion, as follows: "Defendant's counsel complained of the state of his health and urged a continuance because thereof. The record disclosed that the Court did not abuse its discretion in denying a continuance in this respect. While the Court was *at all times solicitous of counsel's welfare,* it appears from the record that counsel was at all times *vigorously active* in behalf of his client and that during the entire time fully protected his interests" (R. p. 106). The cold language, as shown by the record, does not show the tone of voices, gestures or grimaces which may or may not indicate solicitude for counsel's welfare.

As to the "vigorously active" efforts of the trial attorney, Mr. North, we are at a loss to understand how *vigorous* activity may be gleaned from the stark, cold record. Without in any way referring to this case also permit us to say that the labored, halting, painful effort of the speech and the piping voice of a sick man looks just the same in typewriting as the thunderous, resounding tones of a twentieth century verbal gladiator. Mr.

North was very sick. The reputable doctor said so. The counsel for the State did not deny it. The Court by his statements in the record recognized it. The record shows it. There was nothing to show in this record what kind of an argument Mr. North made to the jury. Suffice it to say that it was the argument of a very sick man. The requiring of a sick lawyer to do court work does not tend to promote justice and does not give to a litigant the assurance of his best efforts.

We think that the claim in the opinion about Mr. North being vigorously active and fully protecting Mr. Maher's interests is just a mistake, and Mr. North knows, and everyone connected with the case at the trial knows, that it is not a fact. In any event, Mr. North could have made a better defense if he had not been ill and if a better defense had been made this Court probably would never have been called upon to write the opinion in this case, because a jury would have acquitted Mr. Maher.

The fact remains that Mr. North's defense of William Maher was not good enough, as we believe that an innocent man stands at the present time convicted of a crime of which he is not guilty. Mr. North feels that the answer to that is that he was unable to look up and present to the Court the cases now being presented to this Court, and even if he had been well, he had no time in which to make a systematic inquiry at gasoline stations to find from which station Raymond Agosta bought the gasoline.

Of course, if Mr. Agosta had been alive he could have told exactly when and where he bought the gasoline and his purpose in buying it, and of course that would have made ridiculous the inference that William Maher had purchased the gasoline and it would also have made

ridiculous the inference that William Maher had been driving around with the gasoline in the car, if all of these witnesses, Harry Kane, Harry Ostrum, Rudolph Bruhn and William Joseph, had been available as witnesses and they had testified that there was neither cans nor gasoline in the car while they were riding to the place of Joe Sullivan and when William Maher took them home after the meeting.

True, William Maher testified at Question 1982 of the Bill of Exceptions (R. p. 60) as follows:

"Q. Was there any gasoline in these cans when you took them inside?

A. No, they were just like I got them."

We feel that if a continuance had been granted so that this evidence could have been corroborated the verdict would have been "not guilty."

CONCLUSION

The foregoing Petition for Writ of Certiorari and this supporting brief is respectfully submitted to the Court, and it is urged that same be given such consideration as is fitting in a matter of such grave importance, not only to the defendant, but to all of the people.

Respectfully submitted,

EUGENE D. O'SULLIVAN, and
GRENVILLE P. NORTH,
Attorneys for Petitioner,
William Maher,

(16)

FILED
SEP 16 1944
CHARLES ELMORE CROPLEY
CLERK

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1944

No. 403

WILLIAM MAHER, PETITIONER,

V.

THE STATE OF NEBRASKA, RESPONDENT.

RESPONDENT'S BRIEF IN RESISTANCE TO APPLICATION OF PETITIONER FOR WRIT OF CERTIORARI.

WALTER R. JOHNSON, Attorney General,
of Lincoln, Nebraska,
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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1944

No. 403

WILLIAM MAHER, PETITIONER,

V.

THE STATE OF NEBRASKA, RESPONDENT.

RESPONDENT'S BRIEF IN RESISTANCE TO APPLICATION OF PETITIONER FOR WRIT OF CERTIORARI.

WALTER R. JOHNSON, Attorney General,
of Lincoln, Nebraska,
H. EMERSON KOKJER, Deputy Attorney General,
of Lincoln, Nebraska,
RUSH C. CLARKE, Assistant Attorney General,
of Lincoln, Nebraska,
For Respondent.

To the Honorable, the Chief Justice, and the Associate Justices of the Supreme Court of the United States:

This is an application by one William Maher for a writ of certiorari to review a judgment of the Supreme Court of Nebraska, entered March 17, 1944, in a cause therein

pending entitled William Maher, plaintiff in error v. The State of Nebraska, defendant in error, affirming a judgment of the District Court of Douglas County, Nebraska, convicting the plaintiff in error of the crime of fourth degree arson and sentencing him to the Nebraska penitentiary for a period of two years.

OPINION OF COURT BELOW.

The opinion of the Supreme Court of Nebraska is reported in 13 N. W. (2d) 641, and in 13 S. C. J. (Nebraska Supreme Court Journal) 201. It will be published in Vol. 144 of the Nebraska Supreme Court Reports.

STATEMENT OF THE CASE.

The petitioner's statement of the case is not set out in his brief, but is found in his petition for writ of certiorari (pp. 2-14). It is somewhat inaccurate and misleading, although probably not more so than should be expected in view of the limited portions of the record which petitioner has submitted to this court.

As the writer understands the law and the rules of this court, it is the duty of him who seeks a review by writ of certiorari to file a petition "accompanied by a certified transcript of the record," unless the parties stipulate, under paragraph 8 of rule 38, to omit from the record unnecessary parts thereof. In the case at bar the petitioner made no effort to shorten the record by stipulation. He did attempt to follow the appeal practice by serving upon respondent a notice of the filing of his praecipe, advising the respondent that he might, within ten days, designate other portions of the record, in addition to those indicated by him, as material to a review of the case (R. p. 131). This was obviously an attempt

to cast upon the State the burden of paying for the entire record. The State did, in order to get one or two little matters into the record, designate a couple short portions which it desired to have included in the transcript, but did so "without waiving but at all times reserving its objection" to petitioner's procedure, and without waiving its contention that the petition should be accompanied by a certified transcript of the entire record (R. p. 132).

This designation of additional portions of the record filed by the State was not intended to, and we do not believe it does, operate as a stipulation under paragraph 8 of rule 38. Also, the record submitted is so confusing, owing to the failure to assemble it in chronological order that it is practically impossible to understand it.

The nature of the constitutional question presented by respondent renders it essential that the entire record be before the court, yet petitioner has submitted less than five percent of the evidence in the case.

It may be gleaned from the record which has been submitted that in the State Supreme Court the transcript of the proceedings in the trial court contained at least 63 pages (R. p. 127), and that the bill of exceptions consisted of at least four volumes, totaling more than 706 pages (R. p. 130).

In connection with petitioner's contention that he was denied due process by being compelled to go to trial with a sick lawyer, this court will not be able to learn from the record whether petitioner was ably defended, whether, and if so the extent to which, his sick counsel was physically able to unnecessarily prolong the trial by

lengthy cross-examinations, and dilatory tactics, and whether during the trial his counsel indicated sufficient quarrelsomeness to negative the idea that he was too ill to proceed.

However, it does appear from the record here that the suggestion of counsel's illness arose in connection with an attempt to secure a continuance on the ground of the absence of allegedly material witnesses, and was an afterthought in connection with efforts to delay the trial. At the very outset counsel announced to the court that before filing a challenge to the array he wanted to move for a continuance on the ground that *one* of his witnesses was in the army (R. p. 73). Nothing was then said about any trouble Mr. North was having with his health. At noon on that day the court was about to recess until 1:30 p.m. (R. p. 73). The practice in Omaha has always been to commence the afternoon session at 2:00 p.m. and Mr. North preferred to start at that time, saying that he had been sick the previous week and had only been down town once or twice during that time (R. p. 73). He did not contend he was too ill to proceed, said simply: "I get so all in" (R. p. 73). The court asked what counsel desired, and he answered, "I would like to have two hours at noon" (R. p. 73). This request was granted by the court (R. p. 73).

By 2:00 p.m. Mr. North was ready with his motion for continuance. Although in his motion he claimed to be too ill to proceed (R. p. 74) and produced a rather weak ill-health certificate (R. p. 85), the main burden of the motion was that proposed co-counsel was absent from the city (R. p. 75) and that seven witnesses were absent (R. pp. 76-80) and one dead (R. p. 75).

The court overruled the motion for continuance, but stated that the court would observe short hours and that Mr. North might have a rest at any time he cared to say he wasn't feeling well (R. p. 82).

It also appears that before the State had even completed its case in chief, Mr. North was willing that the court should take up at 1:30 in the afternoons (R. p. 134) and being asked by the court whether he was feeling better, answered, "Yes" (R. p. 135).

From the record, also, may be gleaned the following concerning counsel's physical ability to conduct the trial: He filed a long motion to quash the information on February 2, 1943 (R. p. 6); he appeared and argued this on February 8, 1943 (R. p. 81); between February 23 and March 6, although he was apparently confined to his house three days on one occasion and two days on another (R. p. 85) he was in his office part of the time transacting business, and tried some cases (R. p. 82); on Saturday, March 6, 1943, he filed a demurrer and a request for separate trial (R. pp. 9-10); on Monday, March 8, he argued his demurrer (R. p. 10), made an astonishingly long motion for continuance (R. pp. 74-82), and argued it (R. p. 10); then he moved to quash the jury panel and spent the rest of Monday and part of Tuesday on that phase of the case (R. p. 11), spent almost an entire day examining jurors on voir dire (R. p. 12), made the defense's opening statement (R. p. 12), and consumed three days (with a two-day week-end recess intervening) trying a case (R. pp. 12-13) which should not have occupied the court for more than a day and a half, to judge by the facts as disclosed in the opinion (R. p. 99, et seq.). Even the skeletonized record sub-

mitted to this court discloses that counsel conducted himself with energy (R. pp. 45, 55, 72), dictating alarmingly long motions for continuance (R. p. 74) and for directed verdicts (R. pp. 87, 91).

State of the Record Re Speedy Trial.

An inaccuracy in petitioner's statement of the case may be noted in connection with his charge (Petition, p. 5) that he demanded trial on three or four occasions and continually sought a speedy disposition of this case, and that his counsel was energetically demanding trial in the district court at all times.

The fact is that it appears by the record that no demand for trial, speedy or slow, was made. Petitioner complained that he was prejudiced by the failure of the State to accord him a speedy trial because he was put on trial at a time when certain material witnesses were absent and unavailable. The record discloses his contention that his witnesses were present and could have testified during the first six months of 1942 (R. p. 87), and that they were absent from then on until the date of trial. The record discloses that the information was filed in the district court March 17, 1942 (R. p. 5). The record contains nothing to indicate whether court was in session between March and June, 1942, contains nothing indicating whether the court adjourned in April or May for the summer, or otherwise indicating whether it was possible to try the case in the district court before July, 1942.

Nor does the record show any demand whatever that the trial be had during that period.

There is some testimony in the record tending to establish, without fixing dates, that some effort was made by the defendant to get to trial, but this is rather hazy. The petitioner testified (not in support of any motion to discharge him prior to the trial, but as a part of his defense in chief) that he had asked "members of the county attorney's office" when his trial was to be held (R. p. 66). At the respondent's request the record includes also an additional portion of petitioner's testimony wherein he admitted that he never talked to the county attorney or to Mr. Garrotto (the chief deputy) or Paul Steinwender (chief clerk), or to Mr. Fiedler (the deputy who was handling his case) (R. pp. 133-4).

While he says he talked to "different members" of the county attorney's staff (R. p. 133, Q. 2640), he does not remember who they were (R. p. 133, Q. 2641). Later, he decided that he only talked to one man (R. p. 133, Q. 2652) and he does not know who that was (R. p. 134, Q. 2654). He never asked the court for trial (R. p. 134, Qs. 2659-60), and knows of no instance when his attorney applied to any court and made a demand for trial (R. p. 134, Q. 2663).

It further appears by the sworn testimony of Mr. Brome, chief deputy county attorney at the time of the trial (R. p. 81), that shortly after January 6, 1943, the case was noticed for trial on February 8, 1943 (R. p. 81); that defendant filed a motion to quash which was argued and submitted (R. p. 81) and that although the defense did resist the State's motion for a continuance in February, no contention of any kind was then made about the absence of any material witnesses (R. p. 82). It further appears by Mr. Brome's testimony that the defendant

took no further action toward securing an early trial (R. p. 82).

Section 29-1203, Comp. Stat. 1929, provides:

> "If any person indicted for any offense, who has given bail for his appearance, shall not be brought to trial before the end of the third term of the court in which the cause is pending, held after such indictment is found, he shall be entitled to be discharged, so far as relates to such offense, unless the delay happen on his application, or be occasioned by the want of time to try such cause at such third term."

This statute is copied in the opinion of the Nebraska Supreme Court (R. pp. 107-8).

There is nothing in the record, however, to indicate when the terms of court were held, whether three, or two, or even one term had expired. If will, no doubt, be admitted that the petitioner had given bail and that three terms had not expired, and the Nebraska Supreme Court said in its opinion:

> "The defendant, having failed to bring himself within the provisions thereof (the above-quoted statute), is not entitled to be discharged under its terms."

Since the record fails to contain all the evidence in the case, it fails to establish anything as to the materiality of the testimony of these absent witnesses. One may glean from the record, however, that their testimony was absolutely immaterial. It appears by the opinion of the Supreme Court of Nebraska that the defendant was caught in a restaurant between 3:30 and 4:00 a.m. on the morning of February 25, 1943, apparently preparing to set a fire (R. pp. 110-111). Petitioner contended that

he had been drinking beer in this restaurant for some time, but does not claim that he came to the restaurant until 12:30 or 1:00 a.m. (R. p. 112).

But as to these absent witnesses, it affirmatively appears by the record (R. pp. 56-60) that they could have testified only to events occurring several days before the commission of the alleged crime, and to eating, drinking, and talking politics in the early evening of February 24, hours before defendant, according to his own story, went to the scene of the crime.

For instance, the witnesses William Josephs, Rudy Bruem, Harry Ostrom, Emmett Gardiner, and Harry Kane were simply persons who are alleged to have seen defendant eating in a restaurant between 4:30 p.m. and 8:00 p.m. the afternoon before (R. pp. 57-59). In this connection it is to be observed that the only showing concerning the materiality of the testimony of these witnesses (and that is a very weak showing) appears in connection with a motion for continuance (R. pp. 75-81). In the motion to discharge, which was combined with a motion for a directed verdict (R. p. 87) no showing is made that the absent witnesses' testimony was material or that the defendant was prejudiced by their absence.

Nor does the record disclose any excuse for defendant's failure to take the deposition of these witnesses, although counsel was aware of his right to do so (R. p. 8), and sought a continuance for that purpose.

In connection with the complaint that petitioner demanded and was denied an immediate preliminary hearing before the examining magistrate on February 7, 1942 (Petition p. 3), it may be pointed out that defendant

was free on bail prior to the preliminary hearing (R. p. 4).

Perhaps also it should be pointed out that the references on page 3 of the petition to page 51 of the record are to an exhibit not in evidence and not properly a part of the record (R. p. 50).

ARGUMENT.

Summary.

The petitioner has failed to accompany his petition with "a certified transcript of the record in the case" as required by Rule 38. Instead, he has sought to follow the procedure provided for appeals, has filed a small part of the record and served a copy of his praecipe upon respondent.

This procedure is improper and the petition should be denied for failure to file the entire record. This is especially true in the instant case where it is claimed petitioner was denied the effective assistance of counsel and where it is claimed certain absent witnesses had material testimony to offer.

The statute (Comp. St. Supp. 1941, Sec. 28-5,101) defining fourth degree arson has been construed by the Nebraska Supreme Court as requiring the State to prove malice and wilfullness and as being clear and unambiguous; this construction is binding upon this court, and the statute is not violative of the due process clause of the 14th Amendment.

The information filed by the State under this statute properly advises the defendant of the accusation against

him. The Nebraska Supreme Court has held it sufficient. Whether an indictment charges an offense is for the state court, and no federal question is presented.

It is not necessary in Nebraska, by express statute, nor under the Federal Constitution, that an indictment or information conclude with the words "contrary to the form of the statutes in such case made and provided and contrary to the peace and dignity of the people of the state of Nebraska."

As to the claimed failure to arraign, the fact is the defendant was arraigned and stood mute, as the indisputable record of the court shows; it is claimed petitioner was arraigned in the judge's private office; the record does not show this to be true, but assuming it to be true, under the law of Nebraska the judge's office is part of the court and judicial proceedings held therein are valid.

Further, the claim is that this arraignment is void. If that be granted, the Nebraska statute provides that one who goes to trial, with counsel, without being arraigned, shall be deemed to have pleaded not guilty.

Finally, arraignment is not necessary to due process, and the State could entirely do away with arraignments without violating the 14th Amendment.

The trial court did not err in overruling defendant's motion for continuance, made on the morning of trial. The motion was addressed to the discretion of the court, which discretion is very wide when the motion is made on the eve (or morn) of trial. At all events, except in cases of unusual abuse of discretion, no federal question is presented by a ruling on a motion for a continuance.

As to the sufficiency of the evidence, this court could not pass on it in any event because the evidence is not before the court. But the claimed insufficiency of the evidence presents no federal question, since the due process clause implies no guarantee against an erroneous verdict in a state court.

With reference to petitioner's claim that he was denied a speedy trial, he was tried within the statutory period fixed by the Nebraska legislature and within a period which the Nebraska court holds meets the requirements of the State Constitution as to speedy trial.

The 14th Amendment to the Federal Constitution does not guarantee a speedy trial in a state court. The denial of a speedy trial could only raise a federal question where, together with other factors, this court could say that the State had violated the fundamental principles of justice.

Under all the facts presented by this record, this petitioner had a perfectly fair trial, his counsel was allowed the utmost latitude, he has had his day in the Supreme Court, and no fundamental principles of justice and fairness have been violated. Accordingly no federal question is presented by the record.

Point 1.

Certiorari Should be Denied Because the Petitioner Has Failed to Accompany His Petition With a Certified Transcript of the Record in the Case.

The printed record does not purport to contain the record in the case, but only isolated portions of it, aggregating but a small part of the record.

The petitioner seems to have attempted to get into this court by a combination of the procedure required for certiorari and that governing appeals. He filed a praecipe for certain portions of the record (R. p. 126) and then served a notice on respondent (R. p. 131) as required by the rule relating to appeals. The State of Nebraska certainly was not going to pay out several hundred dollars to furnish petitioner's record for him, although we did suggest a couple dollars worth of the evidence (R. p. 132) with all manner of reservations, objections, and disavowals.

Paragraph 1 of Rule 38 requires that the petition be accompanied by a "certified transcript of the record in the case, including the proceedings in the court to which the writ is asked to be directed."

The writer knows of no case passing squarely on this matter, but "the record in the case" certainly means all of the record. Mr. Robertson in his "Practice and Procedure," page 31, says that it is the practice to bring up the entire record except where unnecessary matter is omitted by some recognized and authorized method.

The writer of this work suggests that the provision of Rule 10 for the filing of a praecipe calling for only certain parts of the record is sometimes followed in certiorari cases but this is apparently upon the theory that counsel find themselves in agreement as to what should be contained in the record. Apparently this procedure assumes that counsel are, in effect, stipulating as provided by paragraph 8 of Rule 38. That situation does not exist here because we specifically objected to anything short of the whole record.

In *Furness, Withy and Company* v. *Yang-tsze Insurance Company*, 242 U. S. 430, 37 Sup. Ct. 141, 61 L. Ed. 409, the court said that a petition for a writ of certiorari is at the risk of the party making it.

At all events, this is true: Where denial of the constitutional right to the assistance of counsel is urged as a denial of due process, this court is required to scrupulously review the record. *Avery* v. *State*, 60 Sup. Ct. 321, 308 U. S. 444, 84 L. Ed. 377. And the alleged denial of due process is to be tested by an appraisal of all the facts in the case. *Betts* v. *Brady*, 316 U. S. 455, 86 L. Ed. 1595, 62 Sup. Ct. 1252. And the court cannot scrupulously review the record and test it by appraising the totality of the facts unless all of them are before the court. More especially is this true where the assertion of lack of counsel depends upon the degree of fever and the extent of the alleged lack of ability of counsel, because while in *Powell* v. *Alabama*, 287 U. S. 45, 77 L. Ed. 158, 53 Sup. Ct. 55, 84 A. L. R. 527, it was held that due process was denied, this was not upon the theory that the 14th Amendment guaranteed the right to counsel, but rather because under the facts in that particular case the assigning of the entire bar of the district as counsel for the defense, in effect, denied the defendants more than the mere semblance of a trial, and because "the trial was conducted in disregard of every principle of fairness." *Betts* v. *Brady*, 316 U. S. 455, 86 L. Ed. 1595, 62 Sup. Ct. 1252.

In *Betts* v. *Brady*, supra, it is said:

> "Due process of law is secured against invasion by the federal government by the Fifth Amendment and is safeguarded against state action in identical

words by the Fourteenth. The phrase formulates a concept less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights. Its application is less a matter of rule. Asserted denial is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial. In the application of such a concept there is always the danger of falling into the habit of formulating the guarantee into a set of hard and fast rules, the application of which in a given case may be to ignore the qualifying factors therein disclosed.

* * *

"As we have said, the Fourteenth Amendment prohibits the conviction and incarceration of one whose trial is offensive to the common and fundamental ideas of fairness and right, and while want of counsel in a particular case may result in a conviction lacking in such fundamental fairness, we cannot say that the amendment embodies an inexorable command that no trial for any offense, or in any court, can be fairly conducted and justice accorded a defendant who is not represented by counsel."

Point 2.

Sec. 28-5,101, Compiled Statutes 1941, Defining Fourth Degree Arson Does Not Violate The 14th Amendment And Is Constitutional And Valid.

The petitioner contends that the statute under which he was prosecuted is unconstitutional and void as being in contravention of Section 1 of the 14th Amendment. He contends that this is so because the statute is vague

and indefinite in that no ascertainable standard of guilt is set up by the law, is unreasonable and arbitrary, etc. (Petitioner's brief, p. 86).

In 1935 the legislature of Nebraska adopted an act (Laws of Nebraska 1935, p. 216) defining the various degrees of arson and providing penalties for such offences. The title of the act was:

> "An Act relating to crime and punishments; to define the crime of arson in its various degrees; to provide penalties therefor; and to repeal Sections 28-501, 28-502, 28-503, 28-504, and 28-505, Compiled Statutes of Nebraska, 1929."

The fourth section of this act is now Section 28-5,101, Comp. St. Supp. 1941, and reads as follows:

> "Any person who wilfully and maliciously attempts to set fire to or attempts to burn or to aid, counsel or procure the burning of any of the buildings or property mentioned in the foregoing sections, or who commits any act preliminary thereto, or in furtherance thereof, shall be guilty of arson in the fourth degree and upon conviction thereof be sentenced to the Penitentiary for not less than one nor more than two years or fined not to exceed One Thousand Dollars. The placing or distributing of any inflammable, explosive or combustible material or substance, or any device in any building or property mentioned in the foregoing sections in an arrangement or preparation with intent to eventually wilfully and maliciously set fire to or burn same, or to procure the setting fire to or burning of same shall, for the purpose of this act constitute an attempt to burn such building or property."

The ingenious argument of the petitioner is that the words "wilfully and maliciously" in the first line of this

section are not to be construed in connection with the words "who commits any act preliminary thereto" in the fifth and sixth lines; that therefore an innocent act preliminary to the setting of a fire may constitute a violation of the law. It was argued in the state court that under this statute a person who threw some old newspapers in the basement, with perfectly innocent intent, would be committing an act preliminary to the setting of a fire, so that if some third person should set fire to the papers and burn the building, the person who innocently left the papers in the basement would be guilty of fourth degree arson.

But the Supreme Court of Nebraska held as a matter of law that "the words 'wilfully and maliciously' apply to those 'who commit any acts preliminary thereto or in furtherance thereof' " and that "the words 'thereto' and 'thereof' apply to 'attempts to set fire to or attempts to burn.' "

And the court added that when the sentence of which the defendant complained was read in relation to the entire act its meaning was certain and clear and the statute was constitutional.

In the first place, it is difficult to find anything indefinite or vague or uncertain in this act which brings the case within the rules laid down in the decisions cited by petitioner (his brief, pp. 90-100). And as construed by our Supreme Court, even petitioner's fancied objections disappear. But even if there were some elements of uncertainty and lack of definiteness in the statutes, it would not follow that enforcement of a statute in a proper case is a denial of due process.

A criminal statute is not lacking in due process of law merely because the application of its prohibition may be uncertain in exceptional cases, especially where the act defined is made criminal only when performed with a specific intent. *High Grade Provision Company* v. *Sherman,* 45 Sup. Ct. 141, 266 U. S. 497, 69 L. Ed. 402.

In *People* v. *Chimovitz,* 237 Mich. 247, 211 N. W. 650, the Michigan Supreme Court held that an arson statute was not violative of the due process clause simply because it did not expressly make exceptions in the case of a harmless destruction of useless buildings, since such an exception was capable of being read into the statute.

The burden of petitioner's brief on this point is that the Supreme Court of Nebraska decided the constitutional question he presented to it wrong. But this court cannot overrule the construction placed on this statute by the Nebraska court. As was said in *Howard* v. *Kentucky,* 200 U. S. 164, 26 Sup. Ct. 189, 50 L. Ed. 421:

> "He seems to make an issue with the court of appeals of the state upon the law of the state, and to contend that the court erred in the interpretation and application of that law. This contention encounters the ruling in *Re Converse,* 137 U. S. 624, 631, 34 L. ed. 796, 11 Sup. Ct. Rep. 191, and other cases, which hold that a 'state cannot be deemed guilty of a violation of its obligations under the Constitution of the United States because of a decision, even if erroneous, of its highest court, while acting within its jurisdiction.'
>
> "We cannot assume error in the decision of the court of appeals. We accept it, as we are bound to do, as a correct exposition of the law of the state—common, statutory, and constitutional."

See also *Bandini Petroleum Company* v. *Superior Court*, 52 Sup. Ct. 103, 284 U. S. 52, 76 L. Ed. 136; *Minnesota, ex rel. Pearson* v. *Probate Court*, 60 Sup. Ct. 523, 309 U. S. 270, 84 L. Ed. 774, 126 A. L. R. 530; *King* v. *West Virginia*, 30 Sup. Ct. 225, 216 U. S. 92, 54 L. Ed. 396.

Point 3.

The Information States a Cause of Action Under the State Law and Meets All Requirements of the Federal Constitution.

The petitioner contends (p. 64, his brief) that the information violates the due process clause of the 14th Amendment in that it is incoherent, indefinite, uncertain, lacking in clarity, and failed to advise him of the nature and cause of the accusation made against him.

His first contention is that it is bad because the words "contrary to the form of the statutes in such cases made and provided and against the peace and dignity of the State of Nebraska" do not appear at the end of Count 1. He makes no contention that the information should also charge the defendant with "not having the fear of God before his eyes and being moved and seduced by the instigation of the Devil." It seems to the writer he should insist on that, also, because these words, which used to appear in common law indictments, are about as important as the rhetorical flourish with which counsel feels all informations should close.

It is true that in Nebraska we ordinarily end an information with the impressive phrase which is so dear to the petitioner's heart, but the legislature of this state

has provided that such language is absolutely unnecessary.

Section 29-1501, Comp. St. of Nebraska, 1929, provides:

> "No indictment shall be deemed invalid, nor shall the trial, judgment, or other proceedings be stated, arrested, or in any manner affected * * * by omitting to charge any offense to have been contrary to the statute or statutes."

This court has repeatedly held that whether an indictment sufficiently charges an offense under a state law is for the state court to determine. *Bergeman* v. *Backer,* 157 U. S. 656, 15 Sup. Ct. 727, 39 L. Ed. 845; *In re Robertson,* 156 U. S. 183, 15 Sup. Ct. 324, 39 L. Ed. 389; *Caldwell* v. *Texas,* 137 U. S. 698, 11 Sup. Ct. 224, 34 L. Ed. 816.

In *Caldwell* v. *Texas,* supra, this court said:

> "No question of repugnancy to the Federal Constitution can be fairly said to arise when the inquiry of the state courts is directed to the sufficiency of an indictment in the ordinary administration of criminal law, and the statutes authorizing the form of indictment pursued are not obviously violative of the fundamental principles above adverted to."

Point 4.

The Record Shows That Petitioner Was Arraigned Before His Trial, But At All Events Arraignment Is Waived By Proceeding to Trial Without Objection and This is a Matter of State Procedure Not Involving Any Question of Due Process.

Petitioner raises the point (his brief, pp. 70-78) that he was denied due process because no plea was ever

entered on the information, and no legal arraignment was had. This involves a matter of state procedure and certainly, even if petitioner's construction of the record were correct, no federal question of denial of due process would be presented.

But to begin with, petitioner persists in ignoring and misconstruing the record and refusing to pay any attention to the state law on this subject. The journal entry of the district court (R. p. 11) recites that the defendant was "duly arraigned and stands mute and refuses to plead, and the court enters a plea of not guilty as to Count 1 and a plea of not guilty as to Count 2 of the information."

The same journal entry further recites that a jury was then impaneled, and the succeeding journal entries (R. p. 12) disclose that the trial then proceeded without further objection.

The petitioner contends that he was arraigned in the judge's private office and that he could not be arraigned there, and that the attempted arraignment is therefore void. He attempted to show this after the final decision of the Supreme Court of Nebraska by suggesting a diminution of the record (R. pp. 117-120), but his motion in this connection was denied (R. p. 126). This, too, presents a matter of state procedure, but obviously the Supreme Court was right in refusing to permit a diminution of the record after judgment. 4 C. J. S. 1592. In the second place, the court was right in overruling the motion for the reason that arraignment in the judge's private office adjoining the court room is, in fact, arraignment in open court. 21 C. J. S. 256; 15 C. J. 898; *Block*

v. *Kearney,* 6 Ca. Unrep. Cases 660, 64 Pac. 267; *Reed* v. *State,* 147 Ind. 41, 46 N. E. 135.

The Nebraska statute (Comp. St. Supp. 1941, Sec. 27-303) provides that:

> "All terms of the district court shall be held at the county seat in the court house, or other place provided by the county board * * *"

In the third place, as heretofore pointed out, the journal entry shows that petitioner was arraigned in open court and this cannot be contradicted by other evidence, such as was offered in the attempt to supplement the record. Under the Nebraska law, the approved journal entry of the proceedings in the district court is the only and the indisputable evidence of the action of the court. *Brown* v. *Ritner,* 41 Neb. 52, 59 N. W. 360; *Ball* v. *Nelson,* 45 Neb. 205, 63 N. W. 361; *Ward* v. *Urmson,* 40 Neb. 695, 59 N. W. 97; *Garneau* v. *Omaha Printing Company,* 42 Neb. 847, 61 N. W. 100; *Ford* v. *State,* 46 Neb. 390, 64 N. W. 1082.

In the last place, it makes no difference in the first place. Petitioner cites (p. 71, his brief) some old cases holding under a former statute that a conviction would be reversed where it appeared that the defendant had not been arraigned prior to trial. The first three cases he cites were all decided before the statutes hereinafter mentioned were amended. The last case, *Ex parte Resler,* was decided after the amendment, but is not even remotely in point.

In a number of cases prior to 1925, it had happened that defendants created enough confusion so that the court and everybody else forgot to arraign them before

trial, and the defendants then went ahead with the trial and got themselves convicted and then raised the point after conviction that they had never been asked with due formality whether they were guilty or not. The Supreme Court, under the statute as it existed at that time, felt obliged to hold, and did hold, that all the proceedings were void unless the defendants were asked certain magic words, unless the court had duly previously stood the defendant up and said, "Prisoner at the bar, to this information what do you say, guilty or not guilty?" Nebraska never went so far as to authorize pressing for a plea with big rocks on the defendant's chest, but an arraignment was essential up until 1925. In that year the legislature, recognizing the ridiculousness of the rule, amended what is now Section 29-1815, Comp. St. 1929, so that it read in part at the time of petitioner's trial in the district court:

> "If the accused appear in person and by counsel and goes to trial before a jury regularly impaneled and sworn, he shall be deemed to have waived arraignment, and a plea of not guilty deemed to have been plead."

So if petitioner's theory that the back-room arraignment is void is correct, he is simply in the position of not having been arraigned at all, and the above-quoted statute settles the matter. And so the Supreme Court has held, but this is a matter of state procedure anyway. This court has held that putting a defendant on trial without arraignment is not a denial of due process. *Garland* v. *Washington*, 34 Sup. Ct. 456, 232 U. S. 642, 58 L. Ed. 772. In this case, the court said:

> "It is apparent that the accused was tried and convicted upon an informaion charging an offense

against the law; that he had a jury trial with full opportunity to be heard, and that he was in fact deprived of no right or privilege in the making of his defense, unless such deprivation arises from the fact that he was not arraigned and required to plead to the second information before trial. The object of arraignment being to inform the accused of the charge against him and obtain an answer from him was fully subserved in this case, for the accused had taken objections to the second information, and was put to trial before a jury upon that information in all respects as though he had entered a formal plea of not guilty. In this view, the supreme court of Washington, following its former decisions, held that the failure to enter the plea had deprived the accused of no substantial right, and that having failed to make objection upon that ground before trial, it was waived and could not be subsequently taken. This ruling, it is contended, deprived the plaintiff in error of his liberty without due process of law within the meaning of the 14th Amendment of the Constitution.

"Due process of law, this court has held, does not require the state to adopt any particular form of procedure, so long as it appears that the accused has had sufficieint notice of the accusation and an adequate opportunity to defend himself in the prosecution. Rogers v. Peck, 199 U. S. 425, 435, 50 L. ed. 256, 260, 26 Sup. Ct. Rep. 87, and previous cases in this court there cited. Tried by this test it cannot for a moment be maintained that the want of formal arraignment deprived the accused of any substantial right, or in any wise changed the course of trial to his disadvantage."

See also *In re Krug,* 79 Fed. 308.

In fact the power of a state over its methods of procedure is substantially unrestricted by the due process

clause of the Federal Constitution. *Jordan* v. *Massachusetts*, 225 U. S. 167, 56 L. Ed. 1038, 32 Sup. Ct. 651.

Point 5.

No Federal Question Is Involved in the Action of the Court in Going to Trial at a Time When One of Defendant's Witnesses Was Dead and the Others in the Army and When Counsel Preferred a Continuance.

Petitioner complains (his brief, p. 78, et seq.) that he was forced to trial when his counsel was "serious ill," when one witness he wanted to use was dead, and others were in the army.

As far as Mr. North's illness is concerned, the record does not show that petitioner was in any wise prejudiced by the condition of counsel's health. Although it is said (p. 78, petitioner's brief) that if Mr. North had to withdraw, the case would have been tried by a counsel unfamiliar with the facts, it is said elsewhere (R. p. 74) that Mr. Bryce Crawford, or "Babe" (R. p. 82) was co-counsel in the case.

As a matter of fact, it looks as though all this talk about co-counsel and being "serious ill" was just simply part of an effort to get a continuance.

And the same thing may be said about the motion for continuance on the one hand and the objection to trial on the other hand, because of the absent witnesses. It is true that Ray Agosta died just before the trial started. But it was not shown that the continuance would remedy that situation. And as we have elsewhere pointed out, none of these other witnesses had anything material to offer in the way of evidence.

The granting or denial of a continuance is a matter which necessarily rests within the discretion of the trial court. *Taylor* v. *State*, 86 Neb. 795, 126 N. W. 752; *Cockeram* v. *State*, 121 Neb. 757, 238 N. W. 524; *Cornell* v. *State*, 138 Neb. 708, 294 N. W. 851. The discretion is wide when the application is made on the eve of trial. *Smith* v. *State*, 109 Neb. 579, 191 N. W. 687. Unless prejudice clearly appears, there is no abuse of discretion in refusing a continuance. *Flanagan* v. *State*, 127 Neb. 640, 256 N. W. 321.

Such is the law of Nebraska, and where there is nothing in the record showing an abuse of discretion, refusing a continuance does not present a case of denial of due process. *Seaboard Air Line Ry.* v. *Koennecke*, 36 Sup. Ct. 126, 239 U. S. 352, 60 L. Ed. 324; *Franklin* v. *South Carolina*, 30 Sup. Ct. 640, 218 U. S. 161, 54 L. Ed. 980. And this is true even where the testimony of the absent witnesses is material. *Minder* v. *Georgia*, 183 U. S. 559, 46 L. Ed. 328, 22 Sup. Ct. 224.

If the theory is that the refusal to grant a continuance was tantamount to a denial of the assistance of counsel, the answer is furnished by *Avery* v. *Alabama*, 60 Sup. Ct. 321, 308 U. S. 444, 84 L. Ed. 377.

Point 6.

The Alleged Insufficiency of the Evidence to Sustain a Conviction Does Not Present a Federal Question, and Anyway the Entire Evidence is Not Submitted to the Court With Petitioner's Application.

The petitioner devotes a few pages (his brief, p. 100, et seq.), without citing any authorities, to contending that he should not have been convicted by the jury.

In the first place, there is no possible way that this court may know whether the evidence is or is not sufficient to sustain a conviction, because practically none of the evidence is before the court. The judgment is entitled to all the usual presumptions and the Supreme Court of Nebraska has said the evidence is amply sufficient to sustain a conviction.

But assuming *arguendo* that there were something to the argument, the petitioner has been fully heard in the regular course of judicial proceedings and the due process clause implies no guarantee against an erroneous decision of a state court. *Central Land Company* v. *Laidley*, 16 Sup. Ct. 80, 159 U. S. 112, 40 L. Ed. 91; *Filer* v. *State*, 36 Sup. Ct. 550, 241 U. S. 648, 60 L. Ed. 1220; *Frank* v. *Mangum*, 237 U. S. 309, 59 L. Ed. 969, 35 Sup. Ct. 582.

Point 7.

The Constitution of the Unitied States Does Not Guarantee a Speedy Trial of Criminal Cases in State Courts.

The petitioner in his brief under point 1 (p. 28, et seq.) starts out with the proposition that he was "denied a speedy public trial in violation of Sec. 1 of Article XIV of the Amendments to the Constitution."

He follows this with the particulars that a complaint was not filed with the examining registrate for two days after his arrest, that the preliminary hearing was continued from February 27, 1942, to March 5, 1942; that he was not tried in the district court for about one year.

Reference is also made to the fact that his counsel was "serious ill."

He then sets out the provision of the Nebraska Constitution (petitioner's brief, p. 30) which guarantees a speedy public trial in all criminal prosecutions.

His entire argument, then (petitioner's brief, pp. 30-63), is devoted to a consideration of what constitutes a speedy trial, and to the right to a speedy trial in state courts under state constitutions and in federal courts under the federal constitution.

Of course, a sufficient answer to this argument is that the United States Constitution guarantees no speedy trial in criminal prosecutions in state courts. The 6th Amendment which contains the only reference to speedy trials to be found in the Constitution is not a limitation upon the powers of the states. *Gaines* v. *Washington*, 277 U. S. 81, 72 L. Ed. 793, 48 Sup. Ct. 468; *Palko* v. *Connecticut*, 302 U. S. 319, 58 Sup. Ct. 149, 82 L. Ed. 288; *Betts* v. *Brady*, 316 U. S. 455, 86 L. Ed. 1595, 62 Sup. Ct. 1252; *Eilenbecker* v. *Plymouth County*, 134 U. S. 35, 10 Sup. Ct. 424, 33 L. Ed. 801; *Howard* v. *Kentucky*, (Ky. 1906) 200 U. S. 164, 26 Sup. Ct. 189, 50 L. Ed. 421; *West* v. *Louisiana*, (La. 1904) 194 U. S. 264, 24 Sup. Ct. 650, 48 L. Ed. 965; *Bolln* v. *Nebraska*, (1900) 176 U. S. 87, 20 Sup Ct. 287, 44 L. Ed. 382; *Brown* v. *New Jersey*, (N. J. 1899) 175 U. S. 174, 20 Sup. Ct. 77, 44 L. Ed. 119; *Brown* v. *Walker*, (Pa. 1896) 161 U. S. 606, 16 Sup. Ct. 644, 40 L. Ed. 819; *Spies* v. *Illinois*, (Ill. 1887) 123 U. S. 131, 166, 8 Sup. Ct. 21, 22, 31 L. Ed. 80.

The Supreme Court of Nebraska has construed the Nebraska Constitution and has said: "Under the facts in this case, we find that the defendant had a speedy trial within the (Nebraska) constitutional provision."

Whether the state court erred in its construction of the State Constitution is not a federal question. *West* v. *Louisiana*, 194 U. S. 258, 24 Sup. Ct. 650, 48 L. Ed. 965; *Howard* v. *Kennedy*, 200 U. S. 164, 26 Sup. Ct. 189, 50 L. Ed. 421.

The petitioner apparently attempts to avoid the effect of this rule by contending that the denial of a speedy trial in a state court is a denial of due process within the meaning of the 14th Amendment to the Federal Constitution (see his brief, p. 28).

The *usus loquendi* of the Constitution itself denies this construction.

The 14th Amendment, of course, is a limitation upon the states. Section 1 thereof prohibits a state from denying due process in a criminal case.

The 5th Amendment prohibits the United States from denying due process in federal courts. Yet, it was thought necessary to adopt the 6th Amendment also to guarantee the right to a speedy trial in the federal courts. Now obviously there was no reason for the 6th Amendment if a speedy trial was already guaranteed under the due process clause of the 5th Amendment, and since we cannot accuse the framers of the amendments of using superfluous words, it must be assumed that "due process of law," as used in the 5th Amendment, does not include the right to a speedy and public trial as guaranteed in the 6th Amendment. And since identical language is used in the 5th and 14th Amendments, it must be assumed that the phrase "without due process of law" in the 14th Amendment means the same thing as the same phrase in the 5th Amendment means. Hence, the requirement of the 14th Amendment that no state

deprive any person of liberty without due process of law does not guarantee a speedy trial in a state court.

A parallel situation has been passed upon by this court.

In *Hurtado* v. *California*, 110 U. S. 516, 4 Sup. Ct. 111, 28 L. Ed. 232, the court considered the question whether the due process clause of the 14th Amendment required an indictment by a grand jury in a prosecution by a state for murder. In the course of the opinion the court said:

> "We are to construe this phrase in the 14th Amendment by the *usus loquendi* of the Constitution itself. The same words are contained in the 5th Amendment. That article makes specific and express provision for perpetuating the institution of the grand jury, so far as relates to prosecutions, for the more aggravated crimes under the laws of the United States. It declares that 'No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be a witness against himself.' It then immediately adds: 'nor be deprived of life, liberty or property, wihout due process of law.' According to a recognized canon of interpretation, especially applicable to formal and solemn instruments of constitutional law, we are forbidden to assume without clear reason to the contrary, that any part of this most important Amendment is superfluous. The natural and obvious inference is, that in the sense of the Constitution, 'due process of law' was not meant or intended to include, *ex vi termini*, the institution and procedure of a

grand jury in any case. The conclusion is equally irresistible, that when the same phrase was employed in the 14th Amendment to restrain the action of the States, it was used in the same sense and with no greater extent; and that if in the adoption of that Amendment it had been part of its purpose to perpetuate the institution of the grand jury in all the States, it would have embodied, as did the 5th Amendment, express declarations to that effect. Due process of law in the latter refers to that law of the land, which derives its authority from the legislative powers conferred upon Congress by the Constitution of the United States, exercised within the limits therein prescribed, and interpreted according to the principles of the common law. In the 14th Amendment, by parity of reason, it refers to that law of the land in each State, which derives its authority from the inherent and reserved powers of the State, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions, and the greatest security for which resides in the right of the people to make their own laws, and alter them at their pleasure. 'The 14th Amendment,' as said by Mr. Justice Bradley in Mo. v. Lewis, (supra), 'does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversities in these respects may exist in two States separated only by an imaginary line. On one side of this line there may be a right of trial by jury, and on the other side no such right. Each State prescribes its own modes of judicial proceeding.'

* * *

"It follows that any legal proceeding enforced by public authority, whether sanctioned by age and custom, or newly devised in the discretion of the legislative power, in furtherance of the general public good, which regards and preserves these

principles of liberty and justice, must be held to be due process of law."

In *Palko* v. *Connecticut*, 302 U. S. 319, 58 Sup. Ct. 149, 82 L. Ed. 288, it appears that Connecticut permitted the state to take an appeal and upon reversal to retry a defendant. The defendant was convicted of second degree murder on the first trial. The state had a reversal and on the second trial the defendant got himself sentenced to death. The Supreme Court of Errors of Connecticut held that this did not constitute double jeopardy. The Constitution of Connecticut prohibits double jeopardy. The Fifth Amendment to the United States Constitution also prohibits double jeopardy. In the opinion the United States Supreme Court said:

"The argument for appellant is that whatever is forbidden by the Fifth Amendment is forbidden by the Fourteenth also. The Fifth Amendment, which is not directed to the states, but solely to the federal government, creates immunity from double jeopardy. No person shall be 'subject for the same offense to be twice put in jeopardy of life or limb.' The Fourteenth Amendment ordains, 'nor shall any state deprive any person of life, liberty, or property, without due process of law.' To retry a defendant, though under one indictment and only one, subjects him, it is said, to double jeopardy in violation of the Fifth Amendment, if the prosecution is one on behalf of the United States. From this the consequence is said to follow that there is a denial of life or liberty without due process of law, if the prosecution is one on behalf of the People of a State. Thirty-five years ago a like argument was made to this court in Dreyer v. Illinois, 187 U. S. 71, 85, 47 L. ed. 79, 86, 23 S. Ct. 28, and was passed without consideration of its merits as unnecessary to a decision. The question is now here.

* * *

"We have said that in appellant's view the Fourteenth Amendment is to be taken as embodying the prohibitions of the Fifth. His thesis is even broader. Whatever would be a violation of the original bill of rights (Amendments 1 to 8) if done by the federal government is now equally unlawful by force of the Fourteenth Amendment if done by a state. There is no such general rule.

"The Fifth Amendment provides, among other things, that no person shall be held to answer for a capital or otherwise infamous crime unless on presentment or indictment of a grand jury. This court has held that, in prosecutions by a state, presentment or indictment by a grand jury may give way to informations at the instance of a public officer. Hurtado v. California, 110 U. S. 516, 28 L. ed. 232, 4 S. Ct. 111, 292; Gaines v. Washington, 277 U. S. 81, 86, 72 L. ed. 793, 48 S. Ct. 468. The Fifth Amendment provides also that no person shall be compelled in any criminal case to be a witness against himself. This court has said that, in prosecutions by a state, the exemption will fail if the state elects to end it. Twining v. New Jersey, 211 U. S. 78, 106, 111, 112, 53 L. ed. 97, 109, 111, 112, 29 S. Ct. 14. Cf. Snyder v. Massachusetts, supra (291 U. S. p. 105, 78 L. ed. 677, 54 S. Ct. 330, 90 A. L. R. 575); Brown v. Mississippi, 297 U. S. 278, 285, 80 L. ed. 682, 56 S. Ct. 461. The Sixth Amendment calls for a jury trial in criminal cases and the Seventh for a jury trial in civil cases at common law where the value in controversy shall exceed twenty dollars. This court has ruled that consistently with those amendments trial by jury may be modified by a state or abolished altogether. Walker v. Sauvinet, 92 U. S. 90, 23 L. ed. 678; Maxwell v. Dow, 176 U. S. 581, 44 L. ed. 597, 20 S. Ct. 448, 494; New York C. R. Co. v. White, 243 U. S. 188, 208, 61 L. ed. 667, 677, 37 S. Ct. 247, L. R. A. 1917D, 1, Ann. Cas. 1917D, 629, 13 N. C. C. A.

943; Wagner Electric Mfg. Co. v. Lyndon, 262 U. S. 226, 232, 67 L. ed. 961, 964, 43 S. Ct. 589. As to the Fourth Amendment, one should refer to Weeks v. United States, 232 U. S. 383, 398, 58 L. ed. 652, 658, 34 S. Ct. 341, L. R. A. 1915B, 834, Ann. Cas. 1915C, 1177, and as to other provisions of the Sixth, to West v. Louisiana, 194 U. S. 258, 48 L. ed. 965, 24 S. Ct. 650.

* * *

"We reach a different plane of social and moral values when we pass to the privileges and immunities that have been taken over from the earlier articles of the federal bill of rights and brought within the Fourteenth Amendment by a process of absorption. These in their origin were effective against the federal government alone. If the Fourteenth Amendment has absorbed them, the process of absorption has had its source in the belief that neither liberty nor justice would exist if they were sacrificed. Twining v. New Jersey, supra (211 U. S. p. 99, 53 L. ed. 106, 29 S. Ct. 14).

* * *

"* * * Is that kind of double jeopardy to which the statute has subjected him a hardship so acute and shocking that our policy will not endure it? Does it violate those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions?' Hebert v. Louisiana, 272 U. S. 312, 71 L. ed. 270, 47 S. Ct. 103, 48 A. L. R. 1102, supra. The answer surely must be 'no.'"

In this discussion we have treated the matter as though a preliminary hearing is a trial which the Constitution guarantees shall be speedy. However, it is elementary that the constitutional guarantee extends only to the trial itself and not to the proceedings leading up to the trial.

In view of the foregoing considerations, it would seem to be perfectly clear that the due process clause of the 14th Amendment does not guarantee this petitioner a speedy trial, as such, in the state court.

Point 8.

All the Things Charged by Petitioner Put Together, Even If True, Do Not Constitute a Denial of Due Process; a Trial Which Does Not Violate Fundamental Principles of Fairness and Justice, and of Which the Defendant Was Given Due Notice and in Which He Was Given an Opportunity to be Heard Meets All Requirements of the Federal Constitution.

Ordinarily "law, in its regular course of administration through courts of justice is due process, and when secured by the law of the state, the constitutional requisition is satisfied." *Caldwell* v. *Texas,* 137 U. S. 698, 11 Sup. Ct. 224, 34 L. Ed. 816. And due process is so secured by laws operating on all alike and not subjecting an individual to the arbitrary exercise of the powers of government. (Idem.)

In *Betts* v. *Brady,* supra, this court has said that an asserted denial of due process "is to be tested by an appraisal of the totality of facts in a given case."

In *Frank* v. *Mangum,* 237 U. S. 309, 35 Sup. Ct. 582, 59 L. Ed. 969, it was contended that the "due process" clause was violated in a Georgia murder prosecution. The opinion is quite long, but the following portion is applicable. On page 979 of the L. Ed. the court said:

> "As to the 'due prcoess of law' that is required by the 14th Amendment, it is perfectly well settled that a criminal prosecution in the courts of a state, based upon a law not in itself repugnant to the

> Federal Constitution, and conducted according to the settled course of judicial proceedings as established by the law of the state, so long as it includes notice and a hearing, or an opportunity to be heard, before a court of competent jurisdiction, according to established modes of procedure, is 'due process' in the constitutional sense. (Citing cases.)"

All the 14th Amendment guarantees, so far as state procedure is concerned, is notice, an opportunity to be heard, and a trial which does not violate fundamental principles of fairness. In *Snyder* v. *Massachusetts,* 291 U. S. 97, 54 Sup. Ct. 330, 78 L. Ed. 674, 90 A. L. R. 595, it was said:

> "The Commonwealth of Massachusetts is free to regulate the procedure of its courts in accordance with its own conception of policy and fairness unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental. Twining v. New Jersey, 211 U. S. 78, 106, 111, 112, 53 L. ed. 97, 109, 111, 112, 29 S. Ct. 14; Rogers v. Peck, 199 U. S. 425, 434, 50 L. ed. 256, 260, 26 S. Ct. 87; Maxwell v. Dow, 176 U. S. 581, 604, 44 L. ed. 597, 606, 20 S. Ct. 448, 494; Hurtado v. California, 110 U. S. 516, 28 L. ed. 232, 4 S. Ct. 111, 292; Frank v. Mangum, 237 U. S. 309, 326, 59 L. ed. 969, 979, 35 S. Ct. 582; Powell v. Alabama, 287, U. S. 45, 67, 77 L. ed. 158, 169, 53 S. Ct. 55, 84 A. L. R. 527. Its procedure does not run foul of the Fourteenth Amendment because another method may seem to our thinking to be fairer or wiser or to give a surer promise of protection to the prisoner at the bar. Consistently with that amendment, trial by jury may be abolished. Walker v. Sauvinet, 92 U. S. 90, 23 L. ed. 678; Maxwell v. Dow, 176 U. S. 581, 44 L. ed. 597, 20 S. Ct. 448, 494, supra; New York C. R. Co. v. White, 243 U. S. 188, 208, 61 L. ed. 667,

667, 37 S. Ct. 247, L. R. A. 1917D, 1, Ann. Cas. 1917D, 629 13 N. C. C. A. 943; Wagner Electric Mfg. Co. v. Lyndon, 262 U. S. 226, 232, 67 L. ed. 961, 964, 43 S. Ct. 589. Indictments by a grand jury may give way to informations by a public officer. Hurtado v. California, 110 U. S. 516, 28 L. ed. 232, 4 S. Ct. 111, 292, supra; Gaines v. Washington, 277 U. S. 81, 86, 72 L. ed. 793, 795, 48 S. Ct. 468. The privilege against self-incrimination may be withdrawn and the accused put upon the stand as a witness for the state. Twining v. New Jersey, 211 U. S. 78, 53 L. ed. 97, 29 S. Ct. 14, supra. What may not be taken away is notice of the charge and an adequate opportunity to be heard in defense of it. Twining v. New Jersey, 211 U. S. 78, 53 L. ed. 97, 29 S. Ct. 14, supra; Powell v. Alabama, supra (287 U. S. 68, 71, 77 L. ed. 170, 171, 53 S. Ct. 55); Holmes v. Conway, 241 U. S. 624, 60 L. ed. 1211, 36 S. Ct. 681. Cf. Blackmer v. United States, 284 U. S. 421, 440, 76 L. ed. 375, 384, 52 S. Ct. 252.

* * *

"So far as the Fourteenth Amendment is concerned, the presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only.

"We are thus brought to an inquiry as to the relation between the defendant's presence at a view and the fundamental justice assured to him by the Constitution of the United States."

Elsewhere in the opinion the court said (p. 684 of 78 L. Ed.):

"The Fourteenth Amendment has not said in so many words that he must be present every second or minute or even every hour of the trial. If words so inflexible are to be taken as implied, it is only

because they are put there by a court, and not because they are there already, in advance of the decision. Due process of law requires that the proceedings shall be fair, but fairness is a relative, not an absolute concept. It is fairness with reference to particular conditions or particular results. 'The due process clause does not impose upon the States a duty to establish ideal systems for the administration of justice, with every modern improvement and with provision against every possible hardship that may befall.' Owenbey v. Morgan, supra (256 U. S. p. 110, 65 L. ed. 845, 41 S. Ct. 433, 17 A. L. R. 873)."

And still later in the opinion (p. 686 of 78 L. Ed.) the court said:

"The law, as we have seen, is sedulous in maintaining for a defendant charged with crime whatever forms of procedure are of the essence of an opportunity to defend. Privileges so fundamental as to be inherent in every concept of a fair trial that could be acceptable to the thought of reasonable men will be kept inviolate and inviolable, however crushing may be the pressure of incriminating proof. But justice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true.

"The constitution and statutes and judicial decisions of the Commonwealth of Massachusetts are the authentic forms through which the sense of justice of the People of that Commonwealth expresses itself in law. We are not to supersede them on the ground that they deny the essentials of a trial because opinions may differ as to their policy or fairness. Not all the precepts of conduct precious to the hearts of many of us are immutable principles of justice, acknowledged semper ubique et ab

omnibus (Otis v. Parker, 187 U. S. 606, 47 L. ed. 323, 327, 23 S. Ct. 168), wherever the good life is a subject of concern. There is danger that the criminal law will be brought into contempt—that discredit will even touch the great immunities assured by the Fourteenth Amendment—if gossamer possibilities of prejudice to a defendant are to nullify a sentence pronounced by a court of competent jurisdiction in obedience to local law, and set the guilty free."

In the same opinion the following language is found in the dissent of Mr. Justice Roberts (p. 689 of 78 L. Ed.):

"The concept of due process is not technical. Form is disregarded if substantial rights are preserved. In whatsoever proceeding, whether it affect property or liberty or life, the Fourteenth Amendment commands the observance of that standard of common fairness, the failure to observe which would offend men's sense of the decencies and proprieties of civilized life. It is fundamental that there can be no due process without reasonable notice and a fair hearing. Though the usual and customary forms of procedure be disregarded, it safeguards the defendant's substantial rights."

In *Palko* v. *Connecticut*, 302 U. S. 319, 58 Sup. Ct. 149, 82 L. Ed. 288, the court said:

"We reach a different plane of social and moral values when we pass to the privileges and immunities that have been taken over from the earlier articles of the federal bill of rights and brought within the Fourteenth Amendment by a process of absorption. These in their origin were effective against the federal government alone. If the Fourteenth Amendment has absorbed them, the process of absorption has had its source in the belief that

neither liberty nor justice would exist if they were sacrificed. Twining v. New Jersey, supra (211 U. S., p. 99, 53 L. ed. 106, 29 S. Ct. 14)."

There is nothing so precious about a speedy trial that it may be said that the doctrine of the 6th Amendment has been absorbed by the 14th Amendment. The only possibility of a delay in trial constituting a denial of due process would be where the delay was so great and other factors contributed to a situation where there would be no possibility of justice. Therefore, while if we were dealing with a speedy trial constitutional provision as such, prejudice would not be involved, but in the case at bar, we submit that petitioner must go further than showing a mere delay and show great prejudice as a result thereof before he may invoke the provisions of the 14th Amendment. And in any event, he must show that he demanded a speedy trial. *Frankel* v. *Woodrough*, 7 Fed. (2d) 796. And in the case at bar it would seem that he must go further and show that he demanded trial at a time when the witnesses, of whose absence he now complains, were available.

So assuming that it would have been nice if defendant had had his immaterial witnesses present, if Mr. Agosta had not died, if Mr. North had felt better, if the trial court had ~~conducted~~ continued the case, the question now to be determined is whether, under all the facts and circumstances as reflected by this record, this court can say that there has been such a denial of fundamental fairness, shocking to the universal sense of justice which men possess, as amounts to an absolute denial of a hearing.

Unless the court can say that this is so, it is, we submit, the duty of the court to deny this application.

Respectfully submitted,

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Lincoln, Nebraska,
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